THE ENGLISH CONSTITUTION

PART I

THE NATURE OF THE CONSTITUTION

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PART I

THE NATURE OF THE CONSTITUTION

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PREFACE

My knowledge of the present English Constitution has been derived primarily from the study of standard works upon the subject, but that has been supplemented by two periods of personal observation. A year's residence in England, from July, 1887, to July, 1888, gave opportunity for an acquaintance with British politics at a most interesting and important juncture of affairs. It covered the later month of the Queen's Jubilee year, and the time when, the Liberals having been defeated on the Home Rule Bill for Ireland, the Conservatives were inducted into office through the coöperation of the Liberal Unionists. Eight years later, I passed the months from February to July, 1896, in London, when the same party had again just returned to power after the failure of the second Home Rule Bill.

In the prosecution of the work of direct observation, I have been the recipient of innumerable courtesies and favours in the form of gifts of books and papers, access to records, and personal information of great value. Among those thus furthering my plans, I take pleasure in mentioning Mr. James Bryce, M.P.; the late Professor Edward A. Freeman; Mr. Sam: Timmins, of Birmingham; Mr. H. H. Howorth, M.P., of Manchester; Mr. Joseph Wilkinson, of York; the late Canon Raine, of York Cathedral; Judge Chalmers, of Leamington; Mr. Alexander Ure, of Edinburgh; and the late Mr. Henry Richards, M.P.

For more direct aid, I gratefully acknowledge deep obligations to Professor John Kirkpatrick, of Edinburgh University, who revised a portion of my manuscript; to Sir Frederick Pollock, Bart., who read the entire manuscript and gave me the benefit of his criticisms and advice. To Professor W. J. Ashley, of Harvard University, Cambridge, Mass., I am espe-

cially indebted for assistance both in the preparation of the manuscript and in the reading of the proof. For a like service, I also owe thanks to Professor O. F. Emerson, of Adelbert College, Cleveland, O.; to Mr. F. I. Herriott, of Des Moines, Ia.; to Professor George Huntington, of Carleton College, Northfield, Minn.; and to Mr. I. B. Richman, United States Consul-General at St. Gall, Switzerland. It is not an empty form of words when I say that whatever merits may be found in this book are due in no small degree to the kindness of generous friends; while for its inaccuracies and defects the author is alone responsible.

In the introductory chapter, the statement is made that one object of the book is to enable American readers to gain a better knowledge of the American government. It may be an advantage to some readers for me to add that Part I. was prepared specifically in order that Americans might be able to read with greater profit Bryce's *The American Commonwealth.* To fully appreciate that great work, the American needs to be well grounded in English politics. He must know the present Constitution in its theory and in its practice.

Part II. is designed to answer certain questions often raised in an attempt to understand the present English Constitution. Americans should never forget that, until the founding of the colonies, English history is our history. Nor should they fail to remember that for a hundred years after, there was a persistent effort to establish in England a government according to what would now be called the American model, — that is, a government based upon an artificial constitution whereby the Legislature and the Executive should be balanced one against the other. It was not until the coming in of the House of Hanover, in 1715, that English constitution-making became of a distinctly different character.

If this book shall prove to be of interest to English readers, it will be by reason of the presentation of the subject treated from an American point of view, rather than from any display of superior knowledge.

JANUARY, 1897.

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PUBLISHER'S NOTE

In response to the request of a number of teachers who wish to use Part I of Professor Macy's work on the English Constitution with their classes in Government, the publishers have consented to bind Part I separately in this volume.

INTRODUCTION

THE American lives under a constitution which he thinks he understands. He reads it. As a schoolboy he often commits it to memory. He knows when and how it was made. In the course of his life he learns many facts about the agencies of government. Many strong tendencies combine to give to the American an impression that he possesses a knowledge of his own government in advance of his actual knowledge, and to create a belief that the Constitution is more artificial than it really is.

The natural and convenient corrective to these erroneous impressions and false beliefs is a study of the English origin of our own political institutions. And to keep the American citizen alive to the fact that he is subject to a living and ever-changing constitution nothing is more effective than a study, by way of comparison and contrast, of the latest developments of the Constitution of the mother-country.

In a recent work on Sir Robert Walpole, Mr. John Morley observes: "The great constitutional question of the eighteenth century, as every reader knows, was whether the government of the realm should be parliamentary or monarchical. Was it to be an absolute rule of the king; or, as Cromwell sought, a Parliament making laws and voting money, coördinate with the Chief Person, and not meddling with the Executive; or a Parliament contain-

ing, nominating, guiding, and controlling its own Executive?"[1]

Apart from the absolute monarchy there are here recognized two distinct forms of free government. America to-day represents one form, and England is the best representative of the other form. The Chief Person in the United States is the President of the Republic, and it is the business of Congress to make laws, to vote money, and not to meddle with the Executive; while in each State the Chief Person is the Governor of the State, and it is the business of the State Legislature to make laws, vote supplies, and not meddle with the Executive.

The American colonies were founded during the century in which there was continuous discussion of the nature of the English Constitution — the century in which there were many efforts made to change in an artificial way the English government. All such efforts at conscious artificial alteration failed, and the English Constitution, as Americans would say, was allowed to drift. Or, as the English are wont to say, after the century of debate and attempted revolution the English Constitution went on growing and developing in its characteristic, normal way. In America the normal way for a constitution to be made or changed is by a conscious act of the people, and this idea has been emphasized in such a way as to tend to obscure the equally important fact of the unconscious growth and development of the American Constitution. In no way can the American citizen so conveniently and so profitably gain the needed sense of the natural growth of his own Constitution independently of all efforts at conscious amendment, as by following out and studying the results of such change in the other branch of the common constitutional stem.

This work on the English Constitution has grown out

[1] *Walpole*, p. 139.

of efforts to assist American students to a better understanding of the constitution of their own government. In order to secure in the mind of an American student a continued interest in a constitution he must at least be made to believe that it is being explained. It is a fundamental element in his notion of a constitution that it is something to be commented upon and explained. To the Englishman the Constitution of his country is simply an undistinguished part of that universe of which he is himself a part. He has no acute sense of the need of an explanation of the one more than of the other. Many British writers have done admirable and useful work in explaining the present English Constitution, just as many of them have taken a leading part in the scientific explanation of the universe. But it is not to be expected that an English author would furnish such a commentary upon his own government as would be in all respects suited to the needs of the average American.

In the same chapter of Mr. Morley's life of Walpole, from which I have already quoted, are found the words: "To-day it is correct to say that the Cabinet has drawn to itself all, and more than all, of the royal power over legislation, as well as many of the most important legislative powers of Parliament." How is it that a Parliament "contains, nominates, guides, and controls its own Executive," while at the same time the Executive has drawn to itself all, and more than all, the royal power over legislation, as well as many of the most important legislative powers of Parliament? To the English statesman, or to the American, whose acquaintance with the political literature of England has enabled him to use words in the English sense, the question suggests no difficulty — he sees nothing to be explained. Parliament is the name of the united government exercising sovereign power — legislative and executive as well. It is, however, a cus-

tomary form of speech to use the word in a more limited sense as applied to the two Houses apart from the Executive. So to the Briton there is an obvious sense in which the Cabinet controls the two Houses, and likewise an obvious sense in which the two Houses control the Cabinet. But to the ordinary American reader Parliament is but one of a multitude of names for a legislative body, and with him it is a cardinal principle that a legislature shall not meddle with the Executive. There is, of course, no difficulty in understanding the bare fact that the Parliament contains the chief executive officers. But the American sense of the word Parliament, and the American sympathy with and prejudice in favour of the parliamentary party, as presented in English history and in the political writings of Englishmen which Americans read with approval, all tend to give undue emphasis to the importance of the two Houses apart from the Executive, and to obscure the actual relations of the Cabinet and the Crown to the Houses.

Only since the formation of the American Union can it be said that Parliament has in any proper sense habitually nominated, guided, and controlled the Executive. Parliament has always in a manner contained the Executive; but until recent years it would be much nearer the truth to say that the Executive habitually nominated, guided, and controlled the House of Commons, than that the House chose and controlled the Executive. The dominance of the House of Commons has been attained only after centuries of political conflict; centuries of contention that Parliament, or the nation as represented in Parliament, ought to rule. The triumph of Parliament has been secured in large part because of the fact that the English political writing with which Americans are most familiar has emphasized, often beyond the line of accurate statement, the powers of Parliament as

compared with those of the Crown. And the peculiar difficulty which the American reader experiences in understanding the executive side of Parliament is therefore rather increased by his acquaintance with this partisan political literature.

Those who read attentively such books as Bagehot's *English Constitution*, Anson's *Law and Custom of the Constitution*, and Dicey's *Introduction to the Study of the Law of the Constitution*, get a clear idea of the working of the present Constitution. But an American reader is not satisfied with knowing what a constitution is; he wants also to know how it was made.

In this work I have undertaken first to translate into American forms of speech English descriptions of the English Constitution, and second to explain the origin of the present Constitution. I have not intended to furnish in any sense a substitute for English works on the same subject, but rather to facilitate their use. The work is in fact the result of experience in the effort to interest American college students in the study of standard authorities on the English government.

The Second Part of my book is not a constitutional history of England in the accepted meaning of the term. It is rather a commentary on that history. It is a selection of such facts, incidents, and opinions as I believe to be helpful to an understanding of the present Constitution. In the ordinary constitutional history the point of view is from the contemporary society of each period described. In such a history events are recorded without especial reference to their obvious bearing upon present political experience. In this work the point of view is present facts and experience. Events in the past not having obvious bearing upon the present Constitution are intentionally omitted. This plan necessitates "tracing history backwards." It is a use of political literature for

the single purpose of explaining present political institutions in their practical workings. The aim is to make the existing Constitution thinkable. A thinkable constitution must necessarily precede a correctly understood constitution. It is by no means expected that all the views and opinions here expressed will be accepted as correct by that class of readers who take the trouble to think for themselves upon the subjects discussed.

I have written the book without attempting a formal, technical definition of the principal term. It may, however, be helpful to the reader to accept the following as a convenient working definition: *A political constitution is that whereby the instrumentalities and powers of government are distributed and harmonized.* If there is any peculiar merit in this definition apart from its brevity, it is found in the words "that whereby." The phrase being entirely general will admit of the substitution of anything that has ever been called a constitution, whether it be a written document proceeding direct from the body politic, or whether it be a body of customs, habits, and understandings, or a body of fundamental laws proceeding from a sovereign ruler or a sovereign legislature; or whether it be a mere matter-of-fact government without reference to origin. Almost anything which is called a constitution in current political writing may be described as that whereby the powers of government are distributed and harmonized. Viewed in an active sense it is the object of a constitution to secure harmony in the exercise of governmental power; that is, to prevent encroachments of the various parts one upon another.

Part I

NATURE OF THE CONSTITUTION

CHAPTER I

A COMPARATIVE VIEW OF THE ENGLISH AND AMERICAN CONSTITUTIONS

IT is difficult to adhere to a technical definition of the word "sovereignty" in a prolonged discussion of actual political institutions. It is a favourite theory of some writers that in all cases true sovereignty rests with the people; that he who is called sovereign, or the body of persons who are regarded as exercising sovereign power, should be viewed, not as the real sovereigns, but rather as agents of the sovereign people. According to this theory the Czar of Russia rules by the permission, or by the will, of the Russian nation.[1] Whatever may be the value of this theory as applied to other nations, it seems to be the only theory that is applicable in the case of the United States. If there is anywhere in this country a supreme and ultimate authority, it is vested in the people. When our forefathers ceased to acknowledge English authority, they began to create agencies for a general government, and, at the same time, to adopt written constitutions for the government of the separate states. A few years later, the people ordained and established a written Constitution for the general government. According to all these constitutions, there is no one officer who does not act under limitations and restrictions, not one who may not be

[1] Rousseau, *Social Contract*, Bk. II.

removed from office and punished for official wrong-doing. There are no officers whom we call sovereign, or whom we are accustomed to think of and speak of as exercising sovereign power. It may be accepted as a fundamental principle of our Constitution that every exercise of the power of government shall be limited. If, in the strict sense of the word, sovereignty exists in such a government, it must be in the people that enact the written constitutions, define the sphere of government, and determine the powers of the agents or officers of the government.

The people of the United States have ordained, through their constitutions, that a part of the business of government shall be transacted by federal officers, and part shall be left in the hands of the states. This peculiarity of the government has led to a novel use of the word "sovereign." We say that the federal government exercises sovereign authority over certain matters, such as foreign relations and the postal service, while the states exercise sovereign authority over certain other matters, such as general police regulations. This has been called "divided sovereignty." In one sense this is an absurd expression; yet the thing which the term describes is not absurd. We live under the authority of two governments, each acting through separate and, for the most part, independent agencies. In our famous controversy respecting the conflict of these two sovereignties, the most extreme of the state-rights party admitted that there were some things which the federal government alone had the authority to do. On the other hand, the most extreme advocate of federal authority admitted that there were some things which the states alone could do. The Civil War may be said to have settled the principle that hereafter a state or a group of states intending to form a separate and independent govern-

ment must obtain the consent of the general government or pursue the old-fashioned plan of revolution, and not attempt to accomplish the object by the exercise of an alleged guaranteed constitutional right. Undoubtedly the War served to emphasize in the public mind the importance of federal authority; yet, in its main features, the Constitution remains unchanged. We are still subject to a "divided sovereignty."

At the time of the formation of the Constitution of the United States, a discussion of the various theories of sovereignty was carried on by a number of philosophers and statesmen, and these theories undoubtedly had some influence upon the result, but they were not the controlling factors. Besides the form of words embodying the notion that all power is derived from the people, there is little in our constitutions or laws to remind us of any theory or peculiar view concerning the nature of sovereignty. It was the fact of the coexistence of two sets of governmental agencies rather than any theory on the subject that gave to our Constitution this unique feature.

But when we come to the study of the English Constitution, the case is different. The substance of the English Constitution is in large part a matter of theory or opinion. It is worth while for the American student to take some pains to get out of the matter-of-fact state of mind which is necessary to enable him to understand his own Constitution, and get himself into a state of mind whereby he can contemplate and consider the influence of theories and weigh the effect of vague and varying opinions and mere conventions in the formation of constitutions.

In the study of the English Constitution we are confronted on every hand with facts and fictions which can be explained only by a knowledge of certain theories of

sovereignty. According to the views of the leading writers and publicists of the present day, sovereignty in England is vested in Parliament, and the ruling branch of Parliament is elected by the people. In America, the people in their sovereign capacity, at the beginning adopted written constitutions for the general and for the state governments, and, on rare occasions, they act in the same capacity when they amend their constitutions or enact new ones. Only thus does sovereign action appear in America. In England, the people act in their sovereign capacity when they choose members of Parliament, and a newly elected Parliament in England embodies in itself all the powers of sovereignty.[1]

Here is one great contrast between the English and the American constitutions. Abolish all our state governments; in the separate and independent federal executive let there be a Cabinet composed of members of the Congress, who at the same time control both legislative and executive business; remove from our Supreme Court its power to refuse to give effect to a law of Congress; leave every power of government, local and general, in the hands of a Congress controlled by a Cabinet and of such agencies as the Congress may choose to create; and we should have in this country a counterpart of the English Constitution: we should then know more about the sovereignty of a government in action than we can ever learn from a study of our actual institutions. The Englishman votes for officers who exercise sovereign power, because in voting for members of Parliament he virtually chooses the party leaders who form the Cabinet which directs and manages Parliament, the sovereign body; the American can only vote for officers who exercise restricted powers. The American electorate has chosen to exhaust its sovereign acts in the creation

[1] Dicey, *The Law of the Constitution*, Lect. II.

of constitutions which make it impossible for any one person or body except the people to exercise sovereign powers; the English electorate is brought into immediate contact with the agency of sovereign power. Parliament exercises the full sovereignty of the nation.[1] Every governmental act is authorized or permitted by Parliament. According to this view the English Constitution is simplicity itself when compared with our own. Mr. Bryce, in his *American Commonwealth*, tells us just how many minutes it takes to complete the reading of the Constitution of the United States. But when we have finished this reading there are many state constitutions which call for a reading. Then there are the decisions of the courts, state and federal, in which provisions of the constitutions are subjected to interpretation. One would not proceed far with this task without discovering that our constitutions with the interpretations thereof furnish reading enough for a lifetime. Yet every word is really a part of the Constitution. It is this partitioning of governmental business between two sets of governmental agencies, and still farther the placing of legislative, executive, and judicial business in the hands of independent agencies, which has so complicated and lengthened the literature of the American Constitution. Leave out of the American Constitution this parcelling out and balancing of powers, and nearly all would be left out.

Note then the simplicity of the English Constitution, in which we are relieved from that nice adjusting of powers which has so many times been the despair of our courts. If we adopt to its full extent the now generally accepted theory of the English Constitution, and apply to

[1] "So long, therefore, as the English Constitution lasts, we may venture to affirm that the power of Parliament is absolute and without control." Cooley's *Blackstone*, 1871, Vol. I., p. 161.

it the American method of description, we shall have a constitution very short and very simple. The substance of it may be summed up in the one sentence, "All the powers of government are in the hands of Parliament." It is well for the American student firmly to grasp this simple but complete notion of the English Constitution. If he constantly bears in mind its simplicity, its brevity, and its comprehensiveness, it will be greatly to his advantage. Mr. Bagehot, in a book of three hundred and fifty pages, has given a marvellously accurate picture of the English Constitution. But if we leave out of his book the long arguments in favour of the English Cabinet system as against the American presidential system, the examination of various methods of administration, the lengthy discussion of the relative merits of royal and non-royal Cabinet governments, and retain simply that part of the book which describes what the Constitution is in our sense of the term, it will be found exceedingly brief. Mr. Dicey's book on *The Law of the Constitution* is for the most part occupied with a well-sustained argument in support of the theory of parliamentary supremacy. The part of the book which an American would naturally accept as a description of the Constitution may be read in a few minutes. In one place is found a statement of the customs of the Constitution, and I find that I can read them all in about one minute. The author does not, however, profess to give a full list; yet if all the laws, which we should naturally classify as constitutional in their character, were clearly summarized, and all the customs of the Constitution were clearly stated, the whole could be read in a short time.

The word "constitution," like other words used in political discussion, has a variety of meanings. In the present stage of political science, he who sets a proper

value upon clearness of ideas will not usually attempt a technical definition of the terms used. The student is compelled to struggle for clearness of ideas. To this end he must learn as many definitions as he can, and, above all, he must learn to detect to the extent of his ability the precise meaning of important words in the passages where they are used. We get no full, comprehensive view of the Constitution of the United States until we look beyond the document which bears that name, and include the constitutions of the various states. These taken together may be held to embody our written Constitution. This Constitution, being written, has impressed Englishmen as stiff and rigid. But to see our real Constitution we are compelled to look beyond these documents to their embodiment in our governmental institutions. These are not rigid; they are not unchanging. At scores of points there are observed tendencies to change. Here the executive tends to encroach upon the legislature or upon the judiciary; there a legislature encroaches upon the executive, or strives to keep its acts from being reviewed by the courts; again, the courts are becoming political and are assuming to decide questions which belong to the legislature; or the federal authorities are encroaching upon the states, or the states upon the federal government; or the governmental agencies are encroaching upon the rights of citizens, or the citizens, through unauthorized agencies, are encroaching upon the field of government. The American Constitution is designed to prevent these encroachments, to preserve the rights of citizens, and to outline and harmonize the work of the several departments of government, and define the duties of the governmental agents. In other words, the chief object of the Constitution is to determine the spheres of governmental agencies and to prevent encroachments.

The English have never in cold blood set themselves to

the task of conscious constitution-making, except for a short time under the Commonwealth. Their Constitution comes from certain facts in their history, and especially from certain notions concerning their history which have been promulgated in recent years. Some English writers maintain that the chief features of their Constitution have existed for centuries, yet the consciousness of the possession of an important constitution is of recent date.

The late Edward A. Freeman was wont to take pleasure in tracing the new and liberal developments in the English government to the early institutions of the country. According to his theory the Constitution of to-day is derived by removing the innovations of the Middle Ages. It is a discovery and a restoration of that which existed a thousand years ago. Other authorities are disposed to question any important connection between recent constitutional development and early institutions. These trace the Constitution of to-day to much more recent facts. Yet all agree in deriving it from facts in English history, either ancient or modern. The real American Constitution, as we have seen, is not simply the documents called by the name, but is besides what has been read out of the documents, or read into the documents, and embodied in certain governmental acts. The English Constitution is made up of certain views which have been read out of or read into English history and embodied in certain governmental acts. In each case it is to be noted that the important thing is not the documents or the history, but the views which men have held respecting them. It is not impossible that a constitutional principle as solid as adamant may be derived from an erroneous notion of history.

CHAPTER II

THE HOUSE OF COMMONS AND THE CABINET

THE real English Constitution is less simple than would appear from the previous description. This is true: first, because authorities are not agreed upon the theory that sovereignty is vested in the people, and there are many facts which seem to give support to a different theory; secondly, because Parliament itself, which is represented as the sole agency of sovereign power, is far from being simple. If one will take the trouble to read current political literature attentively, he will soon discover three distinct meanings of the word "Parliament." 1. The word is used when it means simply the House of Commons; thus, "A new Parliament was elected in 1892," *i.e.* a new House of Commons was elected. 2. The word means the House of Commons and the House of Lords. This is also quite a common use, though still not exact. 3. The word means the Crown and the two Houses, as is shown from the following passage from Dicey, "Parliament means, in the mouth of a lawyer (though the word has often a different sense in ordinary conversation), the King, the House of Lords, and the House of Commons; these three bodies acting together may be aptly described as the 'King in Parliament,' and constitute Parliament."[1]

Ordinarily, when Parliament is called the agent of sov-

[1] *The Law of the Constitution*, p. 35.

ereign power, its three constituents are included. Yet there was a time when Parliament declared the throne vacant and proceeded to fill it by electing William and Mary to be King and Queen. This has always been regarded as a sovereign act, and it was performed by the two Houses alone without a king. Ordinarily an act of Parliament, to be of legal force, must have the sanction of the two Houses and the King. The question then arises, How can such an institution be reconciled with the theory that sovereignty belongs primarily to the voters of England, since neither the King nor the members of the House of Lords are chosen by popular election? The older theory was that real sovereignty was vested in him who was called sovereign, and that he called to his aid the chief Lords of the realm, and provided for the periodic election of representatives from counties, towns, and cities, to supplement the work of the King and the Lords. The theory of popular sovereignty takes large account of the fact that since 1688 all the monarchs of England have occupied the throne by parliamentary title. And since 1832 it has been thoroughly established, both in doctrine and in practice, that concerning all important measures which have received the approval of the House of Commons for the second time and are believed to be in accord with the wishes of a considerable majority of the electors, the House of Lords shall yield to the Commons.[1]

The people do not, it is true, vote directly for members of the House of Lords, but so long as they permit the House to exist, which according to the theory under discussion they might abolish at any time, they do in this negative way express approval of its continued existence and of its acts taken as a whole. In like manner kings, while not chosen by direct act of the electors, nevertheless, according to the modern theory, hold their office subject at

[1] Dicey, *The Law of the Constitution*, p. 359.

all times to the will of the people. An act to abolish the House of Lords, or to reorganize it in such a manner as to require the members to be chosen by popular election, would be accounted not an act of revolution, but an act of reform. Likewise, an act to abolish the Crown or to make the occupant of the throne subject to direct election, would be simply a more extensive exercise of the power already exercised by the Act of Settlement. It will be observed that this theory tends strongly to localize supreme power in the House of Commons.

According to a law passed in 1716 a new House of Commons must be elected at least once in seven years. It is estimated that a little more than one-sixth of the entire population have a right to vote for members of Parliament. If there were universal manhood suffrage, the proportion would be larger. If recent tendencies receive no check, it is not at all unlikely that the remaining fraction of adult men who do not now have a right to vote will be enfranchised. There were in the House, in 1896, six hundred and seventy members. With a few exceptions each member represents one district. Parliamentary districts vary in population from fifteen thousand to eighty thousand. Assuming the continuance of democratic tendencies, the districts will in time be made nearly equal, and the House will thus become an agency for the equal representation of all the people, regardless of class or condition. A large proportion of the members of the House do not reside in the districts which they represent. If the Irish leader wished to have an Englishman chosen to represent an Irish district, an Englishman would be chosen. Many Englishmen are elected by Scottish districts, and conversely. This plan makes it more convenient for a man to choose a parliamentary career and follow it for life. If he fails of election in one district, he may find another district willing to elect him. A really influential

man may always be a member of the House. For example, in 1887, Mr. Goschen became a member of the Cabinet. According to an English law a seat in the House of Commons becomes vacant when its occupant becomes a member of the Ministry. Practical convenience also requires that a member of the Ministry shall also be a member of Parliament, otherwise he cannot continue in office. An opposing candidate contested the seat with Mr. Goschen and defeated him. This made it necessary for Mr. Goschen to find a constituency elsewhere, and, having in his favour the influence of the leaders of the Conservative party who wished to retain him in office, he encountered no difficulty in doing so.

The most important and characteristic function of the House of Commons, as set forth by recent writers on the English Constitution, is the choosing of the Executive. By Executive is here meant the chief executive and administrative officers numbering fifteen, more or less, who are individually responsible for the several departments, and collectively responsible for the conduct of the public business. This body is called the Cabinet, and it is often spoken of as a committee of Parliament.[1] With the Cabinet are associated about thirty other executive officers chosen at the same time and in the same way. The term "Ministry" is applied to the Cabinet and the other executive officers taken together. Language is often used which leads the ill-informed to think that the House of Commons elects the members of the Cabinet; but it does nothing of the sort. When one Cabinet resigns office, it is customary for the retiring Prime Minister, who is the head of the Cabinet, to nominate a successor. The Queen sends for the one nominated and asks him to form a new Ministry, and the Queen then fills the offices upon his recommendation. Thus, in form, it is the Queen

[1] Bagehot, *The English Constitution*, p. 79.

who appoints the Ministry: the House takes no direct action in the matter.

The House is said to choose the Cabinet, because it must have the approval of a majority of the House. If at any time a majority of the members of the House become dissatisfied with the Ministry, they may cause it to resign, or appeal to the country, either by a formal vote of censure, or by refusing to support the measures which the Cabinet "deem important." It is in this indirect way that the House may determine who shall hold the executive offices. But when the House fails to give due support to the Cabinet, the latter may, before resigning, dissolve Parliament and appeal to the electors on the matter at issue. If the voters choose a House which is in harmony with the Cabinet, the Ministry do not resign. In this way, it may be said that the electors choose the Cabinet. Again, it may be said that the members of the dominant party choose the Cabinet. For in the selection of party associates the Prime Minister is bound to choose such men as are acceptable to the party. In this sense the party chooses the Executive.

Again, there is a very important sense in which the members of the Cabinet choose themselves. No one can be chosen as party leader who has not commended himself by conspicuous ability or influence to the favourable consideration of his party associates. The leader of the political party is generally the ablest statesman and the most skilful politician of his party. It probably has not happened in recent years that one has become Prime Minister without having, himself, for years, contemplated the possibility of such an event. In America it is said that every boy expects sometime to be President; in England only the few who believe themselves to be endowed with superior ability expect to be Prime Ministers. Yet

there are always a few in each party who do contemplate the possibility, and these school themselves for the position by the devotion of all their powers to the service of the State. Mr. Gladstone and Mr. Disraeli were never at any time men of mere ordinary ability, yet they were for thirty years active members of the House of Commons before they became leaders of their parties and Prime Ministers of England. They were finally chosen leaders because they had made themselves leaders. In answer to the question, Who shall lead the Liberal party in the absence of Mr. Gladstone? a member of the House named an English statesman, and said, "He is leader whether we will or not." Thus the Prime Minister elects himself by making himself leader of his party and winning success at the polls for it. In like manner the other members of the Cabinet choose themselves by commending themselves to their party by their preëminent ability or by making themselves leaders of influential sections of their party. A few years ago three young men in the Tory party became exceedingly troublesome to the Tory Cabinet. The three were finally all taken into the Cabinet at one time. Two of the three have since had the honour of being mentioned as possible Prime Ministers, and one has become the leader of his party in the Commons. These young men elected themselves to Cabinet rank. One of the three has since died; another is choosing himself for the first place in the Cabinet; that is, he is convincing the members of his party that he represents the dominant political force in the party and in the country.

From the foregoing statements it appears that there is no short and easy answer to the question, Who chooses the English Executive? A complete answer to this question involves a description of the most important features of the English Constitution. First, the Queen must appoint. Second, the House of Commons must at the

time tacitly approve the appointment and must continue to support the measures of the Cabinet so long as it remains in office. Third, a Cabinet after losing the confidence of a majority in the House may dissolve Parliament and go to the electors and thus secure the election of a House that will support it. In that case the Cabinet continues in office by the approval of the electors as expressed through the members of the new House. Fourth, each political party selects a leader who is a potential Prime Minister, and it also chooses a leader of debate in the other House. These have much to do in determining who shall be the other members of the Cabinet. Fifth, men secure Cabinet rank by commending themselves to the good opinion of their party. Not one of these five acts or sets of acts can be disregarded in answering the question, How is the English Executive chosen?

It is convenient to say that the House chooses, because the five acts are chiefly explained by what takes place in the House of Commons. It is in the House of Commons rather than anywhere else that a man commends himself to his party for the position of leader. It is especially with reference to the conduct of business in the House that leaders of the parties are selected. The electors can choose a Cabinet only by choosing members of the House. Through the management of the business of the House a Cabinet retains its position. The action of the Queen in appointing the Cabinet is determined on the advice of the retiring Premier by counting the members of the two parties in the House of Commons. As now understood, the action of the Queen is merely formal. She must choose the leader of the party having a majority in the House of Commons. One may say that the Ministry is not chosen at all by any arbitrary or formal act. It is rather evolved by a number of acts which centre in the House of Commons.

One cannot understand the Constitution and the practical working of the House of Commons without a knowledge of the political parties in England; for, in each of the acts which result in the selection of the Executive, party life and party organization are assumed. It is by counting the members of a political party in the House that the information is derived for the guidance of the Queen in the selection of the head of the Cabinet. It is by party votes in the House that the Cabinet is sustained or driven from office. By party votes in the country a new House is chosen. A man is elected to leadership in a party before he is chosen as Prime Minister. It is as members of the political parties that men of ability secure for themselves Cabinet rank. Hence, what we now know as the English Constitution rests upon the assumption that the voters and the members of Parliament will continue to act in two organic political parties. A change in this respect would necessitate essential changes in the Constitution.

Some events in recent history may serve to illustrate this. In 1885, an election occurred which gave to the House of Commons three hundred and thirty-four Liberals, two hundred and fifty Conservatives, and eighty-six Parnellites. There were thus three parties, neither of which commanded a majority of the votes. The Conservatives, who at the time held the executive offices, resigned them to the Liberals. If all the Irish members had united with the Conservatives, the Liberals could have been driven from office. The Irish demanded, as a condition of alliance with either party, that a law should be passed, giving to Ireland a separate legislature having jurisdiction over local affairs. Mr. Gladstone and a portion of the Liberal party, having decided to accede to the demands of the Irish members, brought in a bill for Home Rule in Ireland. All the Irish members voted with Mr. Glad-

stone, but an equal number of the Liberals voted against him on the question of Home Rule, and thus secured his defeat. The adoption of the Home Rule issue thus led to a division in the Liberal party. The Liberals who refused to support the Home Rule policy of the party were known as Liberal Unionists, and for a time they were not identified with either party. They still sat with the Liberals in Parliament, but refused to support the party in its chief issue. There thus appeared two minor parties, four parties in all, and the minor parties included so many members of Parliament that it seemed impossible for either of the older parties to secure its necessary majority. After his defeat on the Home Rule Bill Mr. Gladstone dissolved Parliament and appealed to the country on the question at issue. As a result of this election, the Conservatives had three hundred and sixteen members, the Liberals one hundred and ninety-two, the Parnellites eighty-six, and the Liberal Unionists, who opposed Mr. Gladstone's bill, seventy-six. There were thus four parties, no one of which commanded a majority of the House. It was now understood that the Parnellites would vote with Mr. Gladstone, but this would still leave him less than a majority. On the main question at issue the Liberal Unionists were in accord with the Conservatives. A majority was made up and a Cabinet was formed, the Liberal Unionists agreeing to vote with the Conservatives. In this way the four parties, so far as the practical working of the House of Commons was concerned, were reduced to two, and the Government proceeded in a regular and constitutional way.

This division into two parties extends beyond Parliament to the constituencies. In the period referred to, but two candidates appeared in most of the districts. If a Conservative was nominated, the Liberal Unionists of the district voted for him. If a Liberal Unionist was nominated, the Conservatives supported him. In like manner

a Liberal and a Parnellite did not stand as candidates in the same district. In 1892 another election occurred. At this time Conservatives and Liberal Unionists had become practically fused into one party. The Liberals, with the support of the Irish members, had a majority in the House of Commons. Mr. Gladstone was thus able to form a government. A second Home Rule Bill was introduced and carried through the House of Commons, but was rejected by the House of Lords. Another election occurred in 1895, which resulted in the triumph of the Conservative Unionist party. The various parties are again practically reduced to two, and this feature of the Constitution remains unchanged.

We have thus seen how the House of Commons performs one of its functions, that of choosing the Executive. But when the Cabinet is chosen, the House is by no means rid of it. Some members of the Cabinet are always members of the House of Lords, but the most important business of the Cabinet is in the Commons, and the most efficient members are members of the Commons. In an important sense the Cabinet for the time being is master of the House. Its members who are members of the House sit on the front bench to the right of the Speaker. This is called the Government Bench, and the Cabinet is called the Government. The members of the political party that supports the Cabinet occupy the other benches on the right of the Speaker. Across the table, facing the Government, is what is called "The Front Opposition Bench." This bench is occupied by the men who expect to form a Cabinet as soon as they can persuade a majority of the House or a majority of the constituencies to vote against the ruling Cabinet. These are called "Leaders of the Opposition." The other benches to the left of the Speaker are occupied by the members of the party that votes against the Government. Irish

Nationalist members of the House, however, continue to sit on the Opposition side whatever the Government in power. When a Cabinet is driven from office and a new one is formed, the parties change sides on the floor of the House. Thus the members always sit facing their political opponents.

Law-making in the House is divided into two classes,— Cabinet and non-Cabinet legislation. Cabinet bills are the result of the deliberations of the Cabinet. They are usually the more important bills, and are those of chief political interest. Every member of the Cabinet is bound to vote for all the measures of which the Cabinet assumes the responsibility. However the members of the Government may differ in their secret Cabinet meetings, before Parliament and before the country they stand as a unit. When a Government bill is introduced by a member of the Cabinet, the chief speeches in its favour are made by members of the Cabinet, and the chief speeches by way of criticism are usually made by the leaders of the Opposition. As a result of discussion and criticism the Cabinet may be induced to accept amendments to their bills. If an important amendment is offered by a member of the Opposition, it is the policy of the Government, if they fear that the amendment will be carried, to forestall defeat by accepting the amendment. Yet even after an amendment has been carried against them, the Government may rule that it is not vital to the bill as a whole, and refuse to resign. Every defeat of this sort, however, tends to weaken and discredit the Cabinet. Members of the Opposition and the Opposition press are sure to claim at such a time that the Government is violating the Constitution by clinging to office after being defeated.

Of course the Government would not at any time be defeated on any measure or vote if the entire party were always at hand and all the members of it voted with the

Cabinet. It often happens that members of the party are greatly opposed to some features of the Government policy, and feel strongly inclined to abstain from voting or to vote with the Opposition. This they can often do and still not endanger the life of the Cabinet. But such action always annoys the Cabinet. The Government has one pretty effectual way of bringing to its support the membership of its party. It may definitely give notice that the particular measure which is in hand is "deemed important" and that the Government proposes to stand or fall with it. This is a notice to the members of the party that if they do not vote with the Cabinet, they will have to incur the expense and the inconvenience of a reëlection to Parliament; and all who represent districts having small party majorities are confronted with the prospect of possible or probable defeat. By this and other means a skilful Cabinet musters the forces of the party to support its measures. By parliamentary custom Wednesday of each week is devoted to the uses of private members and for bills introduced by non-Cabinet members: the Cabinet assumes no responsibility. Many of these bills, however, involve legislation of great importance. They come from either side of the House, and in respect to such bills the members of the Cabinet are generally free to take any position they please. Yet if a private member should introduce a bill the subject-matter of which trenched upon some measure for which the Government held itself responsible, then the Cabinet would either adopt the measure as its own, or would insist upon amending it in such a manner as to harmonize it with its own policy, or would unite in using its majority to defeat the bill.

It thus appears that in a certain sense the Cabinet is responsible for the entire business of the House. It determines what shall be accounted Government business

and what shall be left to private members. At any time the Government may determine to assume the responsibility for a private bill, or to use its majority to destroy it. Or the Government may decide to take for its own measures the time ordinarily allotted to private members. In thus partitioning the business between itself and private members the Cabinet is guided by the state of political debate among the electors. For example, a bill may be regarded as in itself of the utmost consequence, yet if there is little interest manifested in the measure, it is likely to be left to take its chances as a private bill. On the other hand, a measure in itself trivial may have attracted such an amount of public attention as to induce the Government to adopt it. Yet in general it is true that the measures of greatest popular interest are those of greatest importance. Hence the Government bills are usually those of chief importance.

From the foregoing description of the law-making functions of the House of Commons it appears that the members of the English Executive are not only members of the legislature, but, for the time being, are masters of the power of legislation. There are thus united in the same hands the powers of responsible administration and of legislation. When an English Cabinet loses its power to control legislation, it resigns the executive offices, and they are placed in the hands of a Government which can control legislation. It is an important feature of the English Constitution that the control of administration and the control of legislation shall be in the same hands.

Financiering is conveniently discussed as a separate and important function of the House of Commons. Much of the discussion of this subject belongs rather to the science of administration than to the harmonizing and balancing of the separate agencies which we in America call the Constitution. But one feature of financiering

is full of constitutional interest. It is when the Cabinet is securing a vote of supplies to meet the expenses of the Government that the various departments of the Executive come regularly before the House of Commons for criticism. It is the business of the Opposition to call attention to every weak point in the conduct of the Executive and to persuade the House not to vote supplies except upon condition of improvement in administration. I have said that in the matter of law-making the Cabinet is master of the House of Commons. It may easily be shown that, in a certain sense, the House is master of the Cabinet. The Opposition in the House is constantly forcing the Government to modify its administrative policy; and never does a Cabinet succeed in getting its Budget through the House without being compelled by adverse criticism to make many changes and concessions. The Budget often contains some new feature of taxation in which an influential class of taxpayers is interested; and the Opposition in the House is reinforced by an agitation among the electors. In 1888 the Budget contained a provision for taxing vehicles, called "The wheel and van tax." There was an agitation throughout the country against this tax, terminating in a grand demonstration in Hyde Park, and the Government receded from its position. In 1890 the Budget contained a provision that a portion of the license fees collected from dealers in alcoholic liquors should be set aside to be used in giving compensation to dealers whose business should be destroyed by the refusal of county boards to renew licenses. This led to such an agitation in the House and in the country as induced the Cabinet to abandon the measure. It should not be understood that it is only in respect to financial bills that the habit of overawing the Cabinet prevails. Any bill which the Government introduces is liable to contain provisions which elicit such a formidable

opposition as to induce the Cabinet to yield. The Cabinet retains its mastery of the House by yielding to the wishes of the House, by being ever sensitive to the scourge of public opinion, by avoiding scandal in the conduct of public business; in a word, by representing the judgment of the country.

Another feature of the business of the House has some constitutional importance. That is the daily questionings to which the Government members are subjected. Any member has a right to ask any question he pleases concerning the conduct of public business. These questions are printed on the paper containing the order of business for the day, and they are addressed to that member of the Government who is deemed chiefly responsible for the business which is made the subject of inquiry. That is, if it pertains to the government of Ireland, it is addressed to the Chief Secretary for Ireland; or, if the intention or conduct of the Cabinet as a whole is made the subject of inquiry, the question is directed to the Leader of the House. By this arrangement every member of the Cabinet and of the Ministry in the House of Commons lives in the daily prospect of being called to account before the country for any misconduct in his department. If a policeman has unduly interfered with the rights of a citizen, the Home Secretary may be asked to explain. If a postmaster has neglected his duty, the Postmaster-General may be called to an account for it. In this way the public is informed from original sources of the conduct of public business. The public is thus brought into very close relations with the powers of government. Many of the questions are asked for the purpose of calling attention to some weak point in the policy of the Government. Yet it sometimes happens that a member of the Cabinet wishes to have an opportunity of explaining some matter connected with his department. In such a case he may

induce a personal or party friend to ask him a question in the House and thus furnish him the desired opportunity. The constitutional importance of the Question is found in the fact that it is a channel of influence connecting the Cabinet with the House and both with the public.

CHAPTER III

CHECKS AND BALANCES

BEFORE proceeding to discuss the House of Lords, the Crown, and the less important parts of the English government, it is well to get as clear a view as possible of the Constitution on the assumption that the House of Commons stands alone, *i.e.* that the less important parts do not exist. This is the more important because it is coming more and more to be the habit of English writers to discuss the Constitution on the basis of such an assumption. In the *Edinburgh Review* for July, 1890, there is an article entitled "The House of Commons Foiled." It is a criticism on the current obstructive policy of the Opposition in the House of Commons. But it is also a grave constitutional discussion, and there is in it little to suggest that there exists any constitutional force outside of the House of Commons. In nearly every sentence where the word "Parliament" occurs "House of Commons" may be substituted without changing the meaning. The Duke of Devonshire is quoted as saying, "A manifest determination to destroy and to cripple parliamentary institutions would be as clearly rebellion against our Constitution as open resistance to the Crown." The writer of the article continues, "Parliament is king; it is the modern embodiment of the power of the nation; internal attempts to deprive it of its strength are aimed against that very sovereignty of the people which it is the boast of our reformers to have

established on a truly democratic basis." It seems evident that in the thought of the writer the House of Commons is king.

Now upon the assumption that the House of Commons embodies all constitutional power, what sort of Constitution does England possess? As stated in a former chapter, if in such a case the House acted together as one undivided body or committee, it would be difficult for an American to discover anything which he could call a constitution. A constitution, as the word is used in America, assumes the division of powers and the balancing of one power against another. But the House of Commons does not act together as a committee. There are the two political parties which face each other on the floor of the House. Each of these parties is subdivided into the leaders and the led. One set of these leaders fills the chief executive offices and is called the Government. Outside of the House is a body of electors whose political activity often determines the policy of the Government, and who may at any time be called upon to arbitrate between the contending parties in the House.

These, then, are so many diverse sources of power and influence. Yet we seek in vain for an explicit legal recognition of these sources of power.[1] No English law recognizes the division of the House into parties. No law takes any account of the subdivision of each party into leaders and non-leaders. The executive offices which the members of the Cabinet fill are the creation of law, but the Cabinet itself has no legal recognition. The body of electors is a creature of law, yet their important constitutional function as arbiter between the parties is unknown to the law.

That feature of the American Constitution which parcels out power to separate, legally established govern-

[1] Professor Hearn, *The Government of England*, p. 124.

mental agencies may not be discovered in the political forces centring in the House of Commons. The prevention of encroachments and the harmonizing of governmental agencies has been set forth as the main object of the American Constitution. It is possible to apply this form of words to the different agencies in the House of Commons and the electorate. There is in these separate governmental agencies an extensive system of checks and balances. The party of the Opposition checks and modifies in many ways the action of the party of the Government. The Cabinet is checked and restrained by the membership of its own party in the House outside the Cabinet. The rank and file of the party in the House are restrained by the attitude of the Cabinet. The electors are ready at any time to rebuke the Cabinet or to rebuke the Opposition if a policy is adopted which they seriously disapprove. In America the essence of the Constitution is found in a vast system of legally established checks and balances; in England the essence of the Constitution is found in a limited system of checks and balances which, though they are without legal recognition, rest upon certain habits and understandings which are not easily defined, and cannot be enforced in any way other than by an appeal to public opinion.

That these understandings in accordance with which the agencies of government are balanced and harmonized are fundamental in the English Constitution may be seen by carefully marking the language of the best expositors. It has already been shown how the present Constitution is destroyed by assuming the non-existence of the division into two parties. In this I have followed Bagehot, who is accepted as one of the very highest authorities.[1] The meaning here is that if we cannot have one party pitted against the other, the English Constitution cannot exist:

[1] *English Constitution*, p. 209.

the balance of forces would be destroyed. In the article in the *Edinburgh Review* from which I have quoted, the House of Commons is criticised for undertaking to control too minutely the action of the Executive. "Such a body," says the writer, "can only judge satisfactorily of broad lines of policy, or of cases of flagrant mismanagement."[1] It is argued that it is a violation of the Constitution for the House, as a whole, to encroach upon the field of the Executive. If this is carried too far, executive responsibility will end, and the Constitution will thus be destroyed. By the same line of reasoning it may be shown that the Constitution would be impaired if the electors should encroach too much upon the business of the House. Or, if a Cabinet should dominate the House and the constituencies, the balance of forces would be destroyed, and an oligarchy would ensue. The Constitution then, viewed simply as a combination of the forces which centre in the House of Commons, consists of certain habits, customs, and understandings in accordance with which the separate parts are harmonized and prevented from mutual encroachments.

It is natural for an American to ask, How are the provisions of the English Constitution enforced? or, is there any way to prevent encroachment? In America, when the Constitution is violated, the law is violated, and there is at hand a court and a sheriff to right the wrong. In respect to all these constitutional understandings which cluster around the House of Commons, not one of them admits of enforcement in the American sense of the word. The Englishman must trust simply and solely to the state of mind of the various persons who exercise the functions of government.[2] It would be intolerable for an American

[1] See also Mill, *Representative Government*, pp. 114–118, and Sidgwick, *Elements of Politics*, pp. 406–409.

[2] Mr. Gladstone says of the British Constitution, "It presumes more

to be compelled to commit his fortune and his family to the protection of such a Constitution. The American has never put such confidence in man. He has placed over his head a good deal of governmental architecture. He would not easily be persuaded to trust his all to the ability of a few groups of men to preserve perpetually a balance of forces so delicate that they do not admit of intelligent definition. The English have never deliberately committed themselves to such a constitution. It has come to them as a result of forces which they could not or did not choose to control. The English are as courageous under their Constitution as are Americans under theirs, yet they are obliged to put confidence in men as the Americans do not. I once tried to point out to a Birmingham Radical the perils of the English Constitution. He replied that every Englishman was at heart Conservative; that this was as true of the labouring man as of the nobility. The checks which the American expects to enforce by judicial process the Englishman expects to maintain by the state of mind of the citizen.

The thing that I wish to make clear in this discussion is that both in English and American Constitutions are found systems of checks and balances. When Mr. Bagehot argues that the English Constitution is without checks and balances, he means that it is without legal and authoritative checks. Yet no writer has more clearly set forth those modifying influences which I have here called checks than Mr. Bagehot. Mr. Hearn attaches a great deal of importance to parliamentary practice as a constitutional factor. It is important because it has served as a check upon hasty legislation.[1] Mr. Hearn quotes Bentham as calling this "the original seed-plot of

boldly than any other upon the good sense and good faith of those who work it." *Gleanings*, 1, p. 245, quoted by Hearn, *The English Government*, p. 190.

[1] *The Government of England*, p. 556.

English liberty." Yet, since Hearn's book was written this important constitutional barrier has been much weakened. The rules of the House formerly gave unlimited time for debate ; they protected each member in his right to take part in the business. But this is so no longer. It would be difficult to find a better illustration of the fact that the English Constitution rests for its support simply upon the state of mind of the men who govern, than may be found in the recent history of parliamentary practice. About 1878 a few Irish members determined that they would prevent legislation for other parts of the United Kingdom till certain measures were carried for Ireland. The rules of the House made it possible for them to carry their plans into effect. This was the beginning of that sort of obstruction which the Duke of Devonshire, in a sentence already quoted, calls "rebellion against our Constitution." The rules of the House could stand unchanged so long as all the members of the House maintained a reasonable degree of consideration for the wishes of their associates. By their obstructive policy the Irish compelled attention, and forced from the majority many concessions. But this is legislation by minorities, or it is legislation by physical force, and the policy has resulted in the destruction of that feature of the Constitution which formerly served as a check against the too hasty action of the majority. The rules of the House have now been changed so as to give to the majority the power to close debate.

The Irish members resisted the first amendments to the rules. These required the Speaker to first express the opinion that the majority of the House wished to close debate. Then two hundred members must vote with the majority for closure. But when in 1888 the Conservative Government introduced a proposition to amend the rules so that without the initiative of the

Speaker the majority, supported by only one hundred votes, could close debate, the Irish leaders supported the measure. One of them, Mr. Dillon, expressed surprise that such a proposition should come from a Tory Government. He had supposed that the Tories were opposed to hasty and radical changes in the English Constitution. Mr. Dillon declared himself in favour of the measure because he was in favour of speedy and radical changes. He referred to the policy of Home Rule which the Liberal party at that time had espoused. Obstruction served the purposes of the Irish members when they stood alone, but with the prospect of having a majority of the House to support their policy it was equally to their advantage to have the power to prevent delay. With this change in the rules an ancient barrier to hasty legislation disappears. From what has been said and from what remains to be stated, it will be seen that in so far as the English Constitution is democratic it is without legal checks. The checks and balances which belong to the new Constitution arise from habits, and customs, and understandings. The legal checks which remain are not, in form at least, democratic. They are survivals of the earlier Constitution.

CHAPTER IV

THE HOUSE OF LORDS

THIS discussion of the English Constitution has hitherto proceeded upon the assumption that all powers rest with the Commons, and almost wholly ignoring, for the time being, the existence of the House of Lords. That body is now to be considered.

The membership of the House of Lords is more complex than is that of the House of Commons. There are, first, Lords Spiritual and Lords Temporal. The Lords Spiritual consist of the Archbishop of Canterbury, the Archbishop of York, the Bishops of London, Durham, and Winchester, and twenty-one senior Bishops of the Church of England. These all become members of the House of Lords by virtue of occupying a church office or appointment to one. Appointment to any one of the five chief bishoprics confers the privilege of a seat in the House of Lords. Of the remaining twenty-one, those who have longest held a bishopric are entitled to seats. When one of the twenty-one dies or retires, the bishop who has been longest in office succeeds to the privilege. According to an ancient theory of the Constitution, all the people of England belong to the one Established Church, and, in harmony with this theory, the Bishops in the Upper House are held to represent the moral and religious interests of the people. They also directly represent the clerical estates of the realm. In Scotland the laws recognize one of the Presbyterian

Churches as the Established Church, and in Ireland, where a majority of the people are Roman Catholics, no church has been recognized by law since 1869 as forming a part of the government. From Scotland and Ireland, therefore, there are no Spiritual Peers.

The Temporal Peers include four hundred and ninety-six Peers of England and of Great Britain (there are besides fourteen peers who are minors, and not yet entitled to seats in the House), sixteen Scottish Peers, twenty-six Irish Peers (the legal number of Irish Peers is twenty-eight, but at the date of writing, 1896, two of the number had been created Peers of Great Britain), and four Lords of Appeal, often called the Law Peers. The four Law Peers are appointed for life, and they, together with the Lord Chancellor, who is the presiding officer, and the ex-Lord Chancellors attend to the judicial business of the House. The sixteen Scottish Peers are chosen by the entire body of the Scottish peerage from among their own number, and hold office during one term of Parliament; that is, the term of a Scottish member corresponds to that of a member of the House of Commons. The Irish members are likewise elected by all the Irish Peers from among their own number, but they hold office for life. An election occurs only in case of vacancy caused by death. Scotch and Irish Dukes, Marquises, and Earls usually sit nominally as Barons or Viscounts, etc., in the Peerage of Great Britain or England. The entire English Peerage and the Peerage of Great Britain are members of the House of Lords. Of these there were, in 1896, five Princes of the Blood, twenty-one Dukes, twenty-two Marquises, one hundred and eighteen Earls, twenty-seven Viscounts, and three hundred and three Barons: in all, four hundred and ninety-six. Baronets are not regarded as nobles, and have only the title "Sir." Thus, in general, those who in their own right belong to the titled

nobility are members of the House of Lords and constitute the Peerage.

One who is by right a Peer cannot hold a seat in the House of Commons. But there are many members of the Commons who are called Lords. This arises from the fact that sons of Peers above the degree of a baron commonly enjoy the use of a title by courtesy. If the Marquis of Hartington had been a marquis in his own right, he would have had a seat with the Peers, and would have been disqualified from holding a seat in the Commons. Being the oldest son of the Duke of Devonshire and heir to the dukedom, he enjoyed by courtesy his father's second title of Marquis. But when he became the Duke of Devonshire, upon the death of his father, he could no longer hold a seat in the House of Commons.

A peerage is created by letters patent issued by the Crown, conferring upon a man the rank and title of Baron, or one of the superior titles. When the peerage is once created, it cannot be destroyed by any definite process known to English law. The rank and the title descend perpetually to the oldest son of the ennobled man. The bestowing of a peerage in ordinary form involves making the recipient a member of the House of Lords during his lifetime, and his oldest son after him perpetually. But the heir of the deceased Peer does not have a right to a seat in the House of Lords until he has reached the age of one-and-twenty. The oldest existing peerage was created in 1264. Only nine have a date earlier than the fifteenth century, while a large majority of them have been created since 1800.[1]

From the foregoing description it is evident that there is nothing democratic about the composition of the House

[1] For further details as to conditions of membership in the House of Lords, see Anson, *Law and Custom of the Constitution*, Vol. I., Chap. VI.

of Lords. The Bishops are members by virtue of appointment to a bishopric, and the tenure is for life. The Scottish Peers, it is true, are newly elected whenever the House of Commons is dissolved; but only the few who hold the rank of Scottish Peers have a voice in the election, and they may choose only from their own number. The Irish members are elected in the same way, but the election is for life. Four-fifths of the entire body hold office by the favour of the Crown, or by reason of the fact that they are the oldest sons of Peers. The only way in which the House of Lords may rationally be claimed to represent the masses of the people, is by disregarding entirely the composition of the House, and by showing that, as a matter of fact, it performs a function which the masses of the people approve. The Upper House is often described as representing the Hereditary Nobility, the Landed Aristocracy, the Clergy of the Established Church, and the high official class in the Army and the Diplomatic Service. In the curt phrase of recent English political debate this House represents "the Classes."

Of the five hundred and fifty members of the House of Lords, from twenty to thirty habitually attend its sittings. On rare occasions, when a vote of unusual importance is to be had, the party whips succeed in drumming up an attendance of two hundred. Against Mr. Gladstone's Home Rule Bill, in 1893, there was in the House of Lords the phenomenal vote of 419 to 41. Three members constitute a quorum for doing business. A large majority of the members are almost never seen in the House. The House of Lords holds sessions five days in a week, and these are usually less than two hours in length. It will be seen as this discussion proceeds that this comparative freedom from legislative duties is a matter of great convenience to those members of the Cabinet belonging to the Upper House as affording leisure for other

important labours, and the exemption is of especial value to the Premier who chances to be a Peer.

There is a striking contrast between the usual apathy in the House of Lords and the spirit and life of the House of Commons. Nearly every member of the Commons habitually attends its sittings. On important divisions each of the two parties musters nearly all its force. The House sits five days in a week, and from six to nine hours a session.

The plan of the room in which the Lords meet resembles that of the Commons. The presiding officer is called the Lord Chancellor. He is a member of the Cabinet, selected as are other Cabinet officers, and is usually a lawyer of high rank. After he is elected, if not already a Peer, he is usually made a Peer by the Monarch. His seat is in front of the throne, and is called the "Woolsack." As in the Commons, the Cabinet officers occupy the front bench to the right of the presiding officer. The members of the Opposition are on the left. When a Conservative Cabinet is in office, the benches on the left are mostly vacant. The great body of the Lords are Conservatives, but it has always been possible, thus far, for the Liberals to find enough Lords to vote with them to maintain in the Lords a show of opposition to the measures of a Tory Cabinet, and to furnish a few Cabinet officers when the Liberals are in office. However, as at present constituted the House of Lords belongs mainly to one political party, and, as compared with the House of Commons, it is a dull and uninteresting place. It is said that many of the more active and ambitious Lords would prefer to be members of the Commons. There is a certain seat in the gallery of the House of Commons that has gained the name of "Earl —— Seat." The Earl often sits there and listens to the proceedings of the Commons. He gets as nearly into the House where England is governed

as the law will allow, and there he sits like a caged lion, regretting, as many believe, the fortune which has cut him off from active participation in the labours of the sovereign branch of Parliament.

In the account of those governmental agencies which centre in the House of Commons an extensive system of checks and balances has been described, not one of which is recognized by law. But the House of Lords is a legal check upon the Commons. No legislative act of the Commons will be recognized and enforced by the English courts which has not also received the sanction of the Lords. This is a fact of great constitutional importance.

Suppose we concede for the time being that the Lords have no power to resist or reject a measure passed by the Commons, yet the mere fact that they must review the acts of the Commons and may propose amendments is a thing in itself important. The Lords at least give to the Commons the opportunity of reviewing their own acts, and thus exercise an important constitutional function. It is the need of such a function which is the basis of the bicameral system of legislative bodies. Those philosophers are wide of the mark who seek to account for the existence of the bicameral system by the accident of two houses in the English Parliament. It would be more rational to account for this theory of the philosophers by the accident of the peculiar organization of one house in the English Parliament. The Cabinet and the House of Commons are so related as to meet in a measure the needs of a double chamber. First, a measure is discussed in secret Cabinet meetings and gotten into form for presentation to the House. Then the Cabinet has an opportunity to review its own action while its measure is being debated in the House. It is on account of this peculiar structure and method of the House of Commons that to those familiar with its action a second chamber should

seem superfluous. But from its own nature a legislative chamber is in need of an opportunity to review its acts, and the simplest constitutional machinery for effecting this is to place two chambers side by side, and to require the acts of each to be passed upon by the other.

The House of Lords does more than fulfil this simplest and most elementary function of a second chamber. The business of the House of Commons was found to be divided into two classes, Cabinet and non-Cabinet measures. The Cabinet measures are those in which the public is most interested. Many of these are bones of contention between the two parties. There is also a large amount of legislation which, while receiving little public attention, is nevertheless of great importance to the people. In this field of legislation the House of Lords has a free hand: it may reject at will any non-Cabinet measure which the Commons passes. For more than fifty years there have been members of the Commons who have believed that a law ought to be passed which would permit a citizen to marry his deceased wife's sister. Such a bill has passed the Commons many times, and as many times has been rejected by the Lords. So long as this measure appears and is passed through the Commons as a private bill, the only way in which it can be made into a law is by convincing a majority of the voting Lords that they ought to vote for it. One of the wits of the day has explained the oft-repeated rejection of this bill in the House of Lords by the statement that there has not been a time during the last fifty years when a majority of the English voters really wanted to marry their deceased wives' sisters. If this bill should be introduced by a Cabinet which enjoyed the confidence of the House of Commons, and if the majority in the Commons enjoyed the confidence of a majority of the voters, then the House of Lords would

cease to have a free hand. In that case the Constitution requires the Lords to pass the bill or to allow it to pass, without regard to the individual opinions of the members.[1] It thus appears that in respect to a large and important branch of legislation the House of Lords has equal and coördinate powers. It may initiate important legislation by introducing bills; it may prevent legislation by rejecting bills passed by the Commons.

Of the fourteen prescriptions, customs, or rules of the English Constitution which Mr. Dicey gives, the eleventh is thus stated. "If there is a difference of opinion between the House of Lords and the House of Commons, the House of Lords ought, at some point (not definitely fixed) to give way; and should the Peers not yield, and the House of Commons continue to enjoy the confidence of the country, it becomes the duty of the Crown, or of its responsible advisers, to create or threaten to create enough new Peers to override the opposition of the House of Lords and thus restore harmony between the two branches of the legislature."[2] If previous statements in this chapter are correct, this applies only to what has been called Cabinet legislation, and cannot apply to non-Cabinet measures. Of the constitutional relation of the House of Lords to the Cabinet legislation of the Commons it would be difficult to find a more clear, concise, and correct statement than Mr. Dicey has given. From the very form of the statement it is evident that we are dealing with mere understandings rather than with laws.

A bill passed by the Commons must also pass the Lords before it becomes a law. This is not simply an understanding; it is law. The courts do not recognize as law acts of the Commons alone. In this sense the House of Lords is a legal check upon the Commons. Under cer-

[1] See Dicey, *Law of the Constitution*, p. 384 *et seq.*
[2] *Ibid.*, p. 346.

tain conditions the Lords must vote for the measures of the Commons whether they approve of them or not. This is not law, for no English court has recognized it as law. It depends for its observance upon the state of mind of those who govern.

To understand more fully the relation of the House of Lords to Cabinet legislation it is well to remember the constitution of the House of Commons and all the governmental forces which centre in it. It will be observed that Cabinet legislation is party legislation. And since, as we have seen, the House of Lords is at present composed chiefly of one political party, it naturally holds a different relation to the Cabinets of the two parties. When the Conservatives are in power, the two Houses are harmonious, and, in the case of a newly elected Conservative House, all the chief parts of the Constitution are in political harmony. A bill introduced by a Conservative Cabinet is in the hands of its friends during all its stages while passing through both branches of the legislature. If it is amended, the work is done in a friendly spirit. The House of Lords would not throw out a Conservative bill unless the dominant element in the party was ready to reject it. The Lords would not go to the extreme limit of forcing a Conservative Cabinet to appeal to the constituents on one of its measures. Such an appeal would be absurd and unintelligible. It would be one part of a political party appealing to the voters against another part of the same party. It would demoralize the party and paralyze the Constitution. The only constitutional way in which the Lords could force the Conservative Government to dissolve Parliament would be by a majority of the Lords joining the Liberal party and then forcing an appeal with the intention of electing a Liberal Cabinet.

With a Conservative Cabinet, the House of Lords is a

friendly advisory body. The Cabinet bills are received after they have passed the Commons. The Cabinet members, who sit at the right of the Lord Chancellor, support the measures. They have at their back a large majority to ratify every proposition. The few Liberal leaders who occupy the Opposition bench do not ordinarily think it worth while seriously to resist. A diminished majority in the Commons is often attended with serious consequences. Such a vote in the House of Lords is generally without consequence. To a Conservative Cabinet, then, the only point of serious resistance is in the House of Commons. From this it will seem that the Liberals are under a stronger temptation to use obstructive methods in the House of Commons than are the Conservatives. A Conservative Cabinet may legislate for seven years with little regard for the wishes of the nation. A law compels an appeal to the nation at the end of seven years; but if the majority in the House of Commons proves steadfast, there is no power to force an earlier appeal.

With a Liberal Cabinet the case is different. The Cabinet officers in the Lords are confronted by a large Opposition majority. These may not only propose amendments for the sake of criticism; they may also carry amendments. These amendments being made by the Opposition party are sure to be regarded as unfriendly. The Liberals are often compelled to accept amendments or to incur a troublesome alternative. A Liberal Cabinet is thus required to face two serious oppositions, while a Conservative Cabinet faces only one. The Conservative Opposition in the House of Lords may destroy by amending or may reject entire a bill passed by a Liberal House of Commons. When they reject a Cabinet bill, it means that they are ready to appeal to the English voters on the matter at issue, and in case of such an appeal the burden falls upon the Commons rather than upon the Lords.

In quoting from Mr. Dicey the passage given above, attention is called to the words, "should the Peers not yield, and should the House of Commons continue to enjoy the confidence of the country, it becomes the duty of the Crown," etc. This implies that the House of Lords may refuse to yield, and may thus force the Commons to test the question whether they continue to enjoy the confidence of the country.[1] A Liberal Cabinet may have a large and constant majority in the House of Commons, and may nevertheless be forced by the attitude of the House of Lords to hold an election.[2] It is not maintained by any authority on the English Constitution that the extreme measure may be taken to compel the Lords to yield to the Commons unless it has been made evident that the Commons themselves are in accord with the nation on the matter in dispute. The House of Lords is thus in some sort an arbiter between the Liberal Cabinet and the electorate. This is a position of great constitutional importance. As is natural, there is a considerable amount of hostility to the House of Lords in the Liberal party on account of this inequality of conditions between the two Cabinets. It may well happen, however, that a Conservative Democracy may come to feel that the Liberal party, or the party of change, is in need of more effectual checks than is the Conservative party. It may be well to maintain an institution which may at any time compel a direct appeal to the English Democracy before some of the measures of the Radical party receive the sanction of law.[3]

Another clause in Professor Dicey's list of customs of the Constitution may call for some exposition,—that which

[1] Resignation of the Ministry does not always follow. See Hearn, *The Government of England*, p. 169 *et seq.*

[2] Anson, *Law and Custom of the Constitution*, Part I., p. 251.

[3] See Sidgwick, *Elements of Politics*, p. 444.

mentions the duty of the Crown, or of the Ministers of the day, to force the Lords to yield. Of course it is understood that this is not law; it is theory; it is an understanding. Let it be observed that in the use of the word "Crown" and the phrase "its responsible advisers," Mr. Dicey means one and the same thing. As will be explained farther on, the Crown and the Ministry, or the Cabinet, as the terms are now used, are often identical in meaning. The case under discussion supposes that the Lords have rejected a Cabinet measure, that an appeal has been made to the constituents, and a new House of Commons has been chosen which gives its confidence to the Cabinet; that the same measure is again sent to the Lords, and that they still refuse their assent. This is a clear case of lack of harmony in the Constitution; the sovereign power—that is, the power of the nation—is arrested. Harmony is restored by an appeal to the Executive to overcome the obstruction.

Two facts in the past history of England are cited as indicating the method of securing harmony. The first belongs to a time long before the theory of the subordination of the House of Lords had been developed, and at a time when the personal will of the Monarch was a much larger factor in the Executive than it is to-day. Queen Anne, in 1711, created twelve new Peers in order to secure the passage of a bill through the House of Lords. But the case which is chiefly relied upon in support of this method is that of 1832. The Reform Bill having passed through all the various stages which have been outlined, and the Peers still refusing to yield, the King gave to the Prime Minister a written statement that in case the Lords still remained obdurate he would create enough new Peers to secure the passage of the bill. In view of this threat the Peers yielded and passed the bill. It is out of this case especially that the

theory of the subordination of the House of Lords has been developed. The Lords have in general accepted this position. No case has since occurred where it has been found necessary to put forth a formal threat of packing the House of Lords. When Mr. Gladstone, in 1885, introduced a Reform Bill to which he expected the opposition of the Lords, he used language which would bear the interpretation of a threat. He said that he intended to use all the power which the Constitution of England furnished in order to carry his bill to its final passage. He was understood to mean that if need be he would force the Lords to pass it.

There are strong reasons why the Peers should object to the execution of a threat to pack the House. First, by reference to previous descriptions, it will be seen that such a proceeding would naturally have the effect of changing the politics of the House of Lords. The House would become Liberal in politics. Again, the new peerages would be as permanent as the old; for, as the result of a contest between the Crown and the House of Lords in 1856, an understanding was reached that the Executive may not now create life Peers, but only hereditary peerages. Moreover, the multiplication of peerages for such a purpose would have a manifest tendency to degrade the order. Finally, if the Lords should make such an increase necessary for the purpose under discussion, it would indicate the existence of a revolutionary state of mind in the ruling classes.

The creation of new Peers to overcome resistance in the House of Lords has received much attention in political discussion,[1] because it furnishes to the mind a definite,

[1] For diverse views see Sidgwick, *Elements of Politics*, p. 609; Medley, *English Constitutional History*, p. 258; May, *Constitutional History of England*, Vol. I., p. 253 *et seq.*; Anson, *Law and Custom of the Constitution*, Part I., p. 248; Hearn, *The Government of England*, p. 178

tangible method of meeting a difficulty. Yet the act itself is so extreme, so revolutionary in its nature, that it is no longer seriously contemplated. The Lords are induced to yield through motives less easily defined; through respect for public opinion, through fear of confusion and anarchy resulting from a paralysis in the Government. In practice it would be much easier for a Liberal Government to conquer the resistance of the Lords by cutting off supplies, and holding them responsible before the country for the consequences. There is, however, one possible measure for the passage of which the actual packing of the House of Lords might be rationally contemplated, and that is a bill to reconstruct or to abolish the House of Lords itself.

From what has been said it will be inferred that all Cabinet bills of first rate political importance must originate in the House of Commons. As a matter of fact they do so originate. A bill originating in the House of Lords may, however, when it reaches the House of Commons, be adopted by the Cabinet and thus be assisted on its passage. Such, however, is not the usual course. The House of Lords is not expected to originate bills in that field of governmental business covered by the bills of the Cabinet. In current constitutional discussion, the House of Lords is assumed to be a revisory, or second chamber, and the House of Commons is assumed to be the first, or initiative chamber. According to the older theory of the Constitution the House of Lords has a right to initiate legislation on all subjects except taxation. It is one of the most thoroughly established principles of the Constitution that bills for raising revenue must originate in the House of Commons. It is also understood that the House of Lords has not the power of proposing amend-

et seq.; Pike, *Constitutional History of the House of Lords*, p. 335; Dicey, *The Law of the Constitution*, p. 384.

ments to a money bill. In former generations this understanding was used as a weapon for forcing the Lords to pass obnoxious measures, which were tacked to money bills, and the Lords thus constrained to vote for them. This method has long since fallen out of use, and some authorities affirm that it would now be unconstitutional for the Commons to use such a method of compulsion.[1] Yet a writer in the *Westminster Review* (1889)[2] advocates the employment of this method of forcing the hand of the Lords.

The House of Lords has now come to be pretty generally looked upon as the "Sick Man" of the English Constitution. The doctors are numerous, and they are liberal in their offers of prescriptions. It is comparatively easy to outline a course of conduct for the House as it is now constituted, which would make it a most healthful and useful organ of the body politic. The following are presented as examples of current prescriptions: First, let the Lords lose no time and spare no pains in winning the confidence of the Conservative Democracy of England. The surest way to win confidence is to give confidence. Intelligent confidence is based upon a knowledge of the better self of those in whom confidence is placed. Second, let the Lords fully appreciate the fact that their position as members of one party has *prima facie* the appearance of unfairness to the other party. The ideal which naturally fills the minds of men is that the two political parties should be in all respects in a position of substantial equality. Third, a proper appreciation of this apparent unfairness would tend to induce such conduct as to convince the public that there is no real unfairness. That is, the Lords should be conspicuously faithful in the structural revision of bills from the Liberal Cabinet, because this is

[1] Hearn, *The Government of England*, p. 193.
[2] Vol. 131, p. 227.

a sort of revision which all parties approve. They should be as conspicuously careful not to introduce amendments which would admit of a construction hostile to the spirit and intention of the bill. Few laws were ever passed which did not disappoint a large proportion of those who desired their passage. If the Lords make any amendment of the sort suggested, it is likely to bring upon their heads the odium which comes from the failure of the law to fulfil all expectations. Then, having won the confidence of the Conservative Democracy, having established a reputation for fair dealing with the bills of the Liberal Cabinet, the House of Lords would be in a position to fulfil its supreme constitutional function of securing an appeal to the constituencies on important changes, proposed by the party of change. Finally, in order that this plan should work, it is desirable that the Conservative party should leave to the party of change the task of formulating all radical legislation.

CHAPTER V

THE CROWN

IN a former chapter attention was called to the fact that authorities have not always agreed as to the democratic character of the English Constitution. Some have held that sovereign power rests with the Monarch, that the entire Constitution is built up around the throne, that he who is called sovereign is sovereign. Those who hold this view find strong support in the forms of English law. Behind the Woolsack in the House of Lords, upon which the Lord Chancellor presides, is a throne. This reminds one of a time when the Monarch was an actual and integral part of this most ancient branch of Parliament, and it helps to explain the legal fiction that the Monarch is still a part of Parliament. According to the forms of law it is the Queen who summons, dismisses, and dissolves Parliament. The two Houses are the Queen's High Court for deliberation and legislation. The Queen's speech outlines the business of Parliament. It is the Queen who appoints and dismisses the Ministers who make up the Cabinet. The Cabinet asks supplies for the Queen's Government, and, in the accepted phrase of the day, it is the Queen's Opposition who sit on the benches across the way and criticise the doings of the Cabinet. Parliament is the Queen's agent for making laws and for voting supplies. The courts of law are her agents for deciding cases at law. Judicial processes are all in the Queen's name.

A passage from Mr. Bagehot's *English Constitution* puts in strong light the legal relation of the Queen to the Executive business of the realm. "When the Queen abolished Purchase in the Army by an act of prerogative (after the Lords had rejected the bill for doing so), there was a great and general astonishment. But this is nothing to what the Queen can by law do without consulting Parliament. Not to mention other things, she could disband the army (by law she cannot engage more than a certain number of men, but she is not obliged to engage any men); she could dismiss all the officers, from the General Commanding-in-Chief downwards; she could dismiss all the sailors too; she could sell off all our ships of war and all our naval stores; she could make a peace by the sacrifice of Cornwall, and begin a war for the conquest of Brittany. She could make every citizen in the United Kingdom, male or female, a Peer; she could make every parish in the United Kingdom a "University"; she could dismiss most of the civil servants; she could pardon all offenders. In a word, the Queen could by prerogative upset all the action of civil government within the government, could disgrace the nation by a bad war or peace, and could, by disbanding our forces, whether by land or sea, leave us defenceless against foreign nations." [1]

All this is exceedingly puzzling to a matter-of-fact American. In former chapters the English Constitution is described as centring in the House of Commons, and it is found to be thoroughly democratic. When compared with our own government, it seems to us perilously democratic, — a democracy lacking nearly all the legal checks and balances which our own constitution-makers have devised for the purpose of restraining a rampant or ill-advised democracy. This democratic view of the Constitution is also seen to be the correct one as set forth by the

[1] *English Constitution*, p. 32, Introduction to second edition.

highest English authorities. But here is another view of the Constitution, or laws, in which the Queen is made the source and centre of power and authority. It is natural that an American should ask for an explanation.

In the first place, it should be observed that the Queen is not said to exercise these powers, or to be entitled to do so by the Constitution; they merely belong to her according to the *forms of law*. It is not the Constitution, but the forms of law, by which such power is attributed to her. In America we arraign a criminal in the name of the state, or in the name of the people of the state in which the crime was committed, but the people of the state have no direct share in his trial; the criminal has to do with a judge and a jury. The fact that in England the name of the Queen takes the place of "people" in the legal formula gives her no judicial power. No one claims that the Monarch has any direct share in judicial business. So in respect to all the forms which connect the name of the Queen with the acts of Parliament; they are merely forms. The Ministers write the Queen's speech. Parliament determines its own sittings. An act which has passed the two Houses of Parliament requires the Queen's signature before it is completed, yet Mr. Bagehot, from whom I have quoted the declarations respecting the high prerogatives of the Queen, is most emphatic in his denial of the Queen's constitutional power to withhold her signature.[1] The signing is merely a form. Indeed, so far as judicial and legislative business is concerned, the Crown is almost without power.

The case of the Executive is different. All admit that the Monarch does have some share in executive business, and through the relation of the Crown to the Cabinet, the Monarch may affect the Parliament. If she has any influence upon the judiciary, it is through the executive act of

[1] Bagehot, *English Constitution*, p. 125.

appointing judges; but in that matter she is bound to be guided by the advice of the Lord Chancellor. All that is important in the constitutional position of the Crown is found in the Executive.

There are five terms used in the discussion of the English Constitution the meaning of which should be carefully noted. These are the Crown, the Executive, the Ministry, the Cabinet, and the Government. As the words are sometimes used they all have the same meaning. They mean the body of high officials who are responsible for the public business. It is often said that the Crown does a thing, or the Queen does it, when the meaning is that the Ministers do it. As now understood, the Constitution does not permit the Queen, by her own will and on her own responsibility, to perform any executive act. What the Queen does must be done through her Ministers. Yet the term "Crown" is often applied to the personal influence of the Monarch upon the Ministers. "Executive" is a comprehensive term applicable to the Crown and the Ministers together. The "Ministry," as the term is sometimes used, differs from the "Cabinet" in that it includes a larger number of officers. The Cabinet is composed of fifteen, more or less, of the chief executive officers. The Ministry includes additional high officials. When a Cabinet resigns, and a new one is formed, it involves a change of three times as many officers as are in the Cabinet. As the terms are generally used, however, they have the same meaning. "Government" is a frequent substitute for "Cabinet." The Opposition criticise the Government, the Cabinet, the Ministry, and sometimes the Executive. But when the Executive is made the subject of hostile criticism, the term is used as synonymous with the other three. The Crown is not usually made the subject of hostile criticism, nor is the Executive criticised when the term is intended to include the Monarch.

The key to the reconciliation of the conflicting theories of the Constitution is found in the statement already made, that the Queen cannot on her own responsibility perform any executive act. She is not made the subject of criticism, nor is there any way known to the Constitution whereby the Monarch may be punished for wrong-doing. She may not be sued, she may not be impeached. But the Ministers of the Crown may be sued, they may be impeached, and, as we have seen, they may be driven from office for official wrong-doing. In order that some one may be held amenable to the laws and to public criticism, it is understood that for every executive act there must intervene an executive agent who may be publicly arraigned for the act, criticised, and, if need be, punished.

This is not a mere understanding; it is law. Read again the list of high-handed acts which, as Mr. Bagehot has told us, the Queen may perform by her sole prerogative without consulting Parliament. Notice that we are not told that the Queen can do those things on her own responsibility. Not one of those things can she do except through a public official, and the public and the courts of law hold the Minister answerable for the act. As thus construed the prerogative of the Crown means certain acts which may be done by the Executive without consulting Parliament. For all these acts the Cabinet is called to an account in the House of Commons. Every day the Ministers are questioned about their conduct of public business, and their acts are thus brought to the light of day. If those acts are not satisfactory to the people's representatives, the Ministers are driven from office, and others are chosen who will do the business as the people want it done.

This point may be illustrated by the following passage from Mr. Dicey: "The survival of the prerogative, conferring as it does wide discretionary authority upon the

Cabinet [note here the substitution of the word "Cabinet" for the word "Crown"], involves a consequence which constantly escapes attention. It immensely increases the authority of the House of Commons, and ultimately the constituencies by which the House is returned. Ministers must in the exercise of all discretionary powers inevitably obey the predominant authority in the state. When the King was the chief member of the sovereign body, Ministers were in fact, no less than in name, the King's servants. At periods of our history when the Peers were the most influential body in the country, the conduct of the Ministry represented with more or less fidelity the wishes of the Peerage. Now that the House of Commons has become by far the most important part of the sovereign body, the Ministry in all matters of discretion carry out, or tend to carry out, the will of the House. . . . The prerogatives of the Crown have become the privileges of the people, and any one who wants to see how widely these privileges may conceivably be stretched as the House of Commons becomes more and more the direct representative of the true sovereign, should weigh well the words in which Bagehot describes the powers which can still legally be exercised by the Crown without consulting Parliament; and remember that these powers can now be exercised by a Cabinet who are really servants, not of the Crown, but of a representative chamber which in its turn obeys the behests of the electors."[1] Then follows in Mr. Dicey's book the quotation from Bagehot which I have given. If we now read the passage from Mr. Bagehot, and substitute throughout the word "Cabinet" in the place of the word "Queen," we may perceive how prerogative may be reconciled with a democratic Constitution.

The House of Lords is not democratic in its structure, nor has it thus far been democratic in its practical work-

[1] *The Law of the Constitution*, p. 392.

ing. The Lords may furnish a good deal of resistance to the measures of the Commons, and when they do resist, there is no way to overcome their opposition but by a process almost revolutionary in its character; that is, by filling the House with new members or by withholding necessary supplies. We now reach the conclusion, upon the high authority of Mr. Dicey, that through the conferring of many high prerogatives upon the Crown by the form of English law, the English Democracy are provided with an additional means of making the government still more democratic. The Cabinet has a sort of two-edged weapon. The edge for daily use is Parliament. Yet, if the Upper House of Parliament become obstructive, a democratic Cabinet may resort to the use of prerogative, and thus accomplish its end without reference to the will of the aristocratic House.

Mr. Dicey does not rest his case upon a mere theory; he gives an actual instance. In the conduct of executive business there had long existed the custom of purchasing the salaried offices in the Army. In 1871 a Liberal Cabinet passed a bill through the House of Commons to abolish Purchase in the Army. The Lords refused to pass the bill. The Cabinet immediately removed the abuse by using the prerogative of the Crown. Mr. Dicey thinks that had it not been for this second weapon in the hands of the Cabinet the practice of Army Purchase might have continued to the present day.[1] This may be reconciled with former statements as to the power of the Commons over the Lords by the reflection that while theoretically the Cabinet has the power to force the hand of the Lords, it is in fact inconvenient and sometimes impossible for it to do so. In respect to all that branch of business which is covered by the prerogative of the Crown the thing desired may be done without consult-

[1] Dicey, *The Law of the Constitution*, p. 393.

ing the Lords. The especial force of Mr. Dicey's contention is seen in the reflection that not only is royal prerogative democratic in its character, but it is more democratic than is the power not covered by the royal prerogative, in that it may be exercised without the check of the House of Lords.

No better illustration can be found of the teaching that the English Constitution rests upon theory. Royal prerogative strengthens the Democracy only upon the theory that the English voters, through the choice of members of the House of Commons, govern England. The theory assumes that the Cabinet is at all times responsive to the wishes of the House and that the House is at all times responsive to the will of the nation. Royal prerogative is democratic only when it is used to overcome the resistance of an undemocratic House of Lords. There have been in the past kings and cabinets who used royal prerogative to overcome resistance in the House of Commons and to rule without reference to the will of the nation. Circumstances might arise in which the same thing would happen again. In that case royal prerogative would be anything but democratic. What Mr. Dicey says of prerogative is true so long as a certain theory of the Constitution works in a certain way. His contention is that royal prerogative strengthens the leading factor in the nation. At a time when kings were dominant, prerogative strengthened the Crown. When the nobles held the chief power, prerogative strengthened the House of Lords, and as the Commons and the voting constituencies gain the leading place, prerogative gives additional force to the Democracy.

We are now prepared to reconcile the English Constitution as seen from the standpoint of English law with the same Constitution as seen from the standpoint of the facts of government, and we do this by saying that the

forms of law require a series of statements which at the present time are not true. Yet it would be a great mistake to suppose that because the forms of law are in conflict with the actual facts of the Constitution, these forms have therefore no effect upon the actual Constitution. One very marked effect is the tendency which is thus produced to prevent the real Constitution from being reduced to definite written form. When one law contradicts another, it is not possible, or at least it would not be convenient, to put them both into definite written and authoritative form. So long as the forms of law represent the Queen as summoning, directing, dismissing or dissolving the action of Parliament, it would appear inconsistent were there enacted a definite and explicit law placing the management and direction of Parliament in the hands of a legally constituted Cabinet. But so long as these forms are traversed by a series of mere understandings which have never found expression in any official or authoritative way, the inconsistency is not so troublesome. It would make sad havoc with many legal customs and forms of English law if the real Constitution were put into definite and authoritative form; and the English Constitution reduced to definite and authoritative form would really be a very different Constitution from what it now is. A constitution which is made by gradually coming, through contention and conflict, to understandings which contradict the forms of law, is unique in its character. If you reduce such a constitution to writing, you destroy its essential character and put an entirely different one in its place.

The startling character of the English democratic Constitution as compared with the cautiously constructed American Constitution is noticed in a preceding chapter, and the statement is there made that the English themselves never deliberately formed such a constitution. We

have now reached the most important fact in explanation. The ancient theory of the Constitution made the Monarch the centre of power and authority. Around the Monarch all the high governmental agencies, executive, legislative, and judicial, were grouped. The forms of law are still in accord with this ancient monarchical Constitution. The modern democratic Constitution has been formed by a series of acts and understandings which have, in the main, left the ancient forms unchanged. Before the English can have effective legal checks in their democratic Constitution they will be compelled to recognize in their forms of law the fact that such a thing as a Democracy exists. A habit, or an understanding, may be a satisfactory or an effectual check, but it is not a legal check. It is exceedingly difficult to conduct a protracted discussion upon the English Constitution without making statements which appear contradictory. The statement just made seems to imply that the present English Constitution is without legal checks; yet I have several times stated that the House of Lords is one such check upon the House of Commons. As regards non-Cabinet legislative business, the Lords have a free hand, and are often an effectual check upon the Commons.

These contradictions inhere in the nature of the English Constitution. Its legal checks contradict the democratic theory. Hence we are driven to maintain that the checks do not exist, or that the Constitution lacks so much of being democratic, or that the people have approved of a thing about which they have never been consulted.

For the sake of illustration by contrast let us notice the corresponding institutions in the United States. The Senate is a legal check upon the House of Representatives, and these are both agencies of the sovereign people. By the creation of these agencies the people have deliber-

ately put a check upon themselves. They have done it by clearly expressed constitutional law. It is difficult to see how they could have done it by a mere understanding. We will suppose now that the people wish to do something in respect to which the Senate stands in their way. For the time being they are not only checked, but they are checkmated. They cannot change the Constitution without the consent of the Senate. They must bide their time and depend upon the slow method of getting new senators by an indirect process. The people here recognize themselves as sovereign, and have checked themselves in such a multitude of ways as almost to destroy all ideas of sovereignty. The English have clung to the forms of law which made the Monarch sovereign, while they have formed a democratic government which is almost entirely devoid of legal checks; and the highest reach of the unchecked Democracy is shown in the attainment by a democratic Cabinet of a wide range of power which bears the name "Royal Prerogative."

We have now to consider what are the relations of the Monarch to the conduct of governmental business. It would be looked upon as highly improper and unconstitutional for the Queen to attempt to influence the judges in the decision of cases at law. It has come to be quite out of harmony with the Constitution for the Queen to attempt directly to influence the action of Parliament. Parliament, as we have seen, is a place for party strife, and the Queen is not expected to be a partisan. But it is not in conflict with the Constitution for the Queen to attempt to influence the Ministers in matters of administration. As has already been explained, the dominant element in the Executive is the Cabinet, and the Queen is not a member of the Cabinet, though she holds a close official relation to the chief Ministerial officers who compose it. "To state the matter shortly,"

says Mr. Bagehot, "the Sovereign has, under a constitutional monarchy such as ours, three rights, — the right to be consulted, the right to encourage, the right to warn. And a king of great sense and sagacity would want no others. He would find that his having no others would enable him to use these with a singular effect. He would say to his minister: 'The responsibility of these measures is upon you. Whatever you think best must be done. Whatever you think best shall have my full and effectual support. *But* you will observe that for this reason and that reason what you propose to do is bad; for this reason and that reason what you do not propose to do is better. I do not oppose, it is my duty not to oppose; but observe that I *warn.*' Suppose the King be right, and to have what kings often have, the gift of effectual expression, he could not help moving his Minister. He might not always turn his course, but he would always trouble his mind."[1] It is not safe to accept this description as setting forth the style of intercourse which actually takes place between the Monarch and the Minister without considerable modification, but it indicates what is deemed fit in the attitude of the Monarch towards the Minister.

Notice again how at variance are the forms of law and the requirements of the Constitution. According to the forms of law the Monarch is the executive, the Ministers are simply his advisers. According to the Constitution the Ministers are the responsible Executive, while the Monarch has simply the right to be informed as to what they intend to do, and to give advice. It is not necessary that the Ministers should follow his advice. In one respect the Sovereign's case is not different from that of other citizens. It is regarded as the especial business of the Opposition in the House of Commons to warn and

[1] *The English Constitution*, p. 143.

to discourage the Queen's Ministers. Through the daily questioning of the Ministers in the House of Commons the right of the nation to be informed as to the intentions of the Ministers is asserted and maintained. And being informed, the nation, through the press, through public meetings, and in many other ways, exercises the privilege of warning or encouraging. Time and again a hundred thousand people have assembled in Hyde Park, London, for the express purpose of warning the Ministers that a proposed action would not be for the good of the country, and a Ministry which may perchance have been deaf to the warnings of the Monarch has heeded the warnings of the multitude. But the Monarch has a right to be informed of the intentions of the Ministers before they are made public. In reply to questions in the House of Commons a Minister sometimes says that the state of public business is such that he thinks it best to withhold the information requested. It is understood, however, that the Ministers have no right to withhold information from the Queen on the ground of the exigencies of public business. In 1851 Lord Palmerston was dismissed from the office of Secretary for Foreign Affairs, partly because he neglected to give to the Queen the information which was her due, and partly because he neglected to give due information to his associates in the Cabinet. It is the duty of the Foreign Secretary to keep the Queen duly informed as to all matters pertaining to foreign relations, and it is the duty of the Prime Minister to keep her informed as to the purposes and plans of the Cabinet in general. As will be explained below, the Prime Minister exercises important powers apart from the Cabinet as a whole. So also each member of the Cabinet as the head of an administrative department has a measure of independent power. Mr. John Morley mentions as a practical power still left to the Crown that the Sovereign may

demand the opinion of the Cabinet as a court of appeal against the Minister.[1] This, as will be seen, is a limitation upon the independent power of the Prime Minister. It does not, in theory at least, limit the power of the Cabinet as a whole.

The Queen being placed in possession of the secrets of the Government, is bound not to use her knowledge in any way to thwart the plans of the Ministers. Early in the reign of the present Monarch Sir Robert Peel, as the head of the Ministry, insisted upon the right of changing the ladies of the Queen's household because the places were held by the wives of his political opponents, and he suspected that through them the Opposition was apprised of the secrets of the Government. The Sovereign may warn his Ministers, he may try to dissuade them; he may not betray them; it is his duty loyally to support them in the policy which they finally adopt, however much it may be opposed to his personal views.

It is understood that the relation of the Monarch to the conduct of Foreign Affairs is a little more close and intimate than his relation to other business. The Queen writes personal letters to other monarchs. Americans will recall the letters written by her to Mrs. Lincoln and to Mrs. Garfield. She was by common consent regarded as the fit person to express the sympathy of the English people with our great national sorrows. The Queen personates the people as does no other official. In matters which are simply personal; matters which are in no way connected with the policy of the Government, the Queen enjoys something like the same freedom in her correspondence which others enjoy. Yet it is found difficult, in practice, for the Queen to correspond with the monarchs of the European Continent without being suspected of interference in matters of state. The monarchs of

[1] *Walpole*, p. 159.

Continental Europe personally attend to important matters of international relations; the English Constitution denies to the Queen any interference in such affairs. Hence complaints have, in recent years, found expression in the public press to the effect that the Queen's private correspondence with European monarchs had tended to complicate the business of English diplomacy. The Constitution requires the Ministers to inform the Queen of their plans before they are fully matured, and it seems to be equally clear that the Constitution requires the Queen to inform the Ministers of all intended personal communications which may be suspected of having an influence upon matters of state.

It is not an easy matter clearly to understand just how much the Monarch does influence the action of the Executive. Not many writers have attempted to analyze carefully, and to separate the personal factor of the Monarchy from the Ministry. Mr. Bagehot leaves nothing to be desired so far as analysis is concerned. He makes clear enough a theoretical distinction between the Monarch and the Cabinet. He gives many facts about the doings of former monarchs at a time when the Constitution was not what it is to-day. He is remarkably explicit and detailed in his information as to what an ideal Monarch might do with a Cabinet under the Constitution as it is to-day. Having convinced us that he, above all others who have attempted to write upon the subject, was capable of illuminating the whole line of contact between the actual Monarch and the actual Constitution, he contents himself with a rather vague remark to the effect that "*we* shall never know, but when history is written, our children may know, what we owe to the Queen and Prince Albert." Mr. Bagehot is definitely opposed to letting the light shine upon certain parts of the Constitution. He says: "Above all things our royalty is to

be reverenced, and if you begin to poke about it, you cannot reverence it. When there is a select committee on the Queen, the charm of royalty will be gone. Its mystery is its life. We must not let in daylight upon magic."[1] This passage from Mr. Bagehot seems eminently fitted to do the very thing which he says ought not to be done; that is, to destroy reverence for monarchy. His book was written more than a quarter of a century ago. In its tendency to destroy superstition and reverence for the persons of monarchs it has been equal to a good many parliamentary committees. The thing that Mr. Bagehot was especially discussing in the passage quoted was royal prerogative. And Mr. Dicey has shed a flood of daylight upon this subject. The matter which is still left in doubt is the amount and the kind of influence which the Queen exerts over the acts of the Executive.

When we think of the habit, in the political life of England, of carefully weighing and discussing every important force, and observe the infrequency of any allusion to the Queen as a political force, we should naturally conclude that she exerts little influence of any kind. Yet if it be true that before the Ministry commit themselves to an important line of administrative policy they must get their plans into definite shape and present them to the Queen, that method alone would have no small influence over the executive policy. Even if the Queen at such times gives none of the wise advice which Mr. Bagehot supposes, the fact that the Ministers explain their policy to such a personage cannot be without influence upon the policy. In like manner, if the Ministry explain in advance their legislative programme, the mere fact of having thus to explain must have an influence upon the programme. In this way, while the Queen has lost every trace of direct

[1] *The English Constitution*, pp. 127–128.

legislative power, yet, in consequence of this connection with the Executive, there may remain to the Crown more than a trace of legislative influence. In the making of appointments to office the current phrase of the day is that the Queen appoints, or that the Cabinet appoints. Now if the Ministers consult the Queen in the matter of appointments, that course alone would exert an influence upon appointments. In a former chapter the Queen's share in the making up of a new Ministry has been explained. In ordinary times the Queen's share is mainly formal and unimportant. The impression, however, prevails that the preferences of the Royal Family do influence the appointment of Ministers. If the Queen did not go through with the form of appointing the Ministers, then some other form would have to be invented, and a change of form would be likely to result in some change in the character of the business. Mr. Bagehot discusses certain conditions under which it may be possible for the Monarch to exercise a real choice in naming the Prime Minister. Parties may be equally divided, or there may be more than two parties, no one of them commanding a majority in the House of Commons. At such a time the Monarch may let the party leaders solve the difficulty as best they can; or, if the Monarch be exceeding wise, he may aid in solving the problem by divining the men best fitted to unite the less partisan elements from different parties. But Mr. Bagehot is careful to explain that at such a time the Monarch is likely to do more harm than good, and that in nearly all cases the wisdom of the Monarch will manifest itself by leaving the party leaders to get out of the difficulty as best they can. So in the matter of driving a Ministry from office, it is still theoretically possible that the balance of other political forces may be such that the will of the Monarch may be a determining factor in a change of the Cabinet. Here again a truly

wise Monarch will almost never think it best to put to the test this theoretic power.

From these statements, it would seem that the power of the Crown as represented in the person of the Monarch is not great, though his influence may be much more than that of an ordinary citizen. The mere fact that the Cabinet is required to inform the Queen of its intended action, may serve greatly to modify that action. As the fact of the continuance of the forms of law which represent the Monarch as the source of power, has tended to the development of an unchecked Democracy, so it is not unlikely that the habit of exempting the doings of the Sovereign from political discussion, is now tending to destroy the political influence of the Crown. As the consciousness of the democratic character of the Constitution becomes more general, it is natural that every important political factor shall become the subject of political debate. To keep the Queen out of the field of debate, it is likely to be more and more necessary to minimize her political influence. It has been possible for an alert ear, at any time in recent years, to catch the sound of an implied censure of the Queen, in that she is believed to have been more loyal to the Government when Lord Beaconsfield or Lord Salisbury was at the head of the Cabinet, than she has been when Mr. Gladstone was Prime Minister. Probably no one is in a condition to say positively that the Queen has been more loyal to one Ministry than to another, yet the vague belief that it is so has tended to develop a spirit of unfriendly criticism. The area of debate is sure to extend with the consciousness of democracy. There is likely to be forced upon the Monarch more and more directly the alternative of being shorn of political influence, or of being brought into political debate. Circumstances might easily arise in which the fact or the suspicion that the Monarch favoured a certain policy, would of itself be a

positive force against the policy. A secret society has not a fair chance in a successful democracy; it is almost sure to be suspected of being worse than it really is. If mysterious influences associated with the Monarch cannot be explained and defended in public debate, they are likely to be misrepresented and turned to a bad account.

At the tomb of Washington the guide is accustomed to say to the visiting pilgrims that during the Civil War the soldiers of both armies visited the grounds, and that it was their custom whenever they met at this spot to lay down their arms and shake hands as friends. Americans cannot be enemies at the tomb of Washington. To the American, Washington personates the deepest feelings of patriotism. In England, the Queen is the sentimental head of the nation, and conveniently personates the feeling of patriotism. I can easily believe that the sentiments that gather about the Monarch are a force of some consequence in the English Government. Mr. Bagehot has taken large account of these sentiments. He represents the chief function of the Crown to be that of deluding the masses of the people into the belief that they are really governed by a monarch, thus preventing them from injurious meddling with the real Government. I do not believe the English people ever were deluded upon this question to the extent that Mr. Bagehot assumes. I am sure they are not so deluded now. I can more easily believe that the few who have felt that their personal interests lay in the perpetuation of the high prerogatives of the Crown have been deluded into the notion that it was to their advantage to maintain all the forms of royal power, and that they have not perceived that they were thus contributing to the formation of the most absolutely democratic Constitution that has yet been attempted in any country. I can understand how an instructed Democracy may insist on perpetuating these

forms which no longer delude for the sake of perpetuating this free and unchecked democratic government.

From this description it is evident that the thing of chief constitutional importance about the Crown is the fact that it is made the centre of certain legal forms and certain formal executive acts which have tended to the development of an extreme and unchecked Democracy. These forms, while nominally in conflict with the Constitution, are in their practical working in entire accord with it. Circumstances might arise in which some of these forms might be vitalized into organs of positive power. Mr. Dicey has suggested a plan by which the Crown may be brought into positive touch with the democratic Constitution. He proposes that it shall be made the duty of the Queen, in the case of laws or parliamentary acts which are deemed to be of unusual importance, to commit such acts to a vote of the people before they shall go into effect. That is, the Queen shall have the power of a discretionary *referendum*. The Cabinet, when balked in the House of Commons, may dissolve Parliament and appeal to the people on the matter at issue. The case of Mr. Gladstone's appeal to the people on his first bill to secure an Irish Parliament is in point. This is like the *referendum*, in that the people, in voting for members of Parliament, are indirectly giving expression on the chief measure in debate at the time.

Again, we have discussed the possibility of the House of Lords fulfilling the function of securing an appeal to the people on important measures which have passed the Commons; as in the case of Mr. Gladstone's second Home Rule Bill. This also is indirect. The obnoxious measure can only be defeated by choosing a majority of the opposite political party. But Mr. Dicey proposes that the Monarch shall have power to secure a direct *referendum*. In that case the people will vote for or against the law

itself. It might readily happen that the people would at the same time defeat a measure which a party has passed and elect a majority of the same party to the House of Commons. In such a case it would be the duty of the party to modify its policy so as to be in accord with the mandate of the sovereign people. It is possible to conceive of this proposed scheme as a sort of revitalization of the now defunct power of royal veto. The Monarch instead of exercising the power in person passes it on to the real sovereign, the people. Certainly, there can be no objection to this proposed revival of royal power on account of its lack of harmony with the democratic Constitution.

CHAPTER VI

THE MINISTRY

AS has already been shown, the Cabinet holds important relations to the House of Commons, the House of Lords, and to the Crown. Indeed, the Cabinet is the very core of the Constitution. It gathers to itself the control of both legislative and executive business

The following were the members of the Cabinet in 1896: 1. Marquis of Salisbury, Prime Minister and Secretary of State for Foreign Affairs. 2. Lord Halsbury, Lord High Chancellor. 3. Duke of Devonshire, Lord President of Council. 4. Viscount Cadogan, Lord Privy Seal. 5. Sir Michael E. Hicks-Beach, Chancellor of the Exchequer. 6. Sir Matthew White Ridley, Bt., Secretary of State for the Home Department. 7. Mr. Joseph Chamberlain, Secretary of State, Colonial Department. 8. Marquis of Lansdowne, Secretary of State, War Department. 9. Lord George Francis Hamilton, Secretary of State, Indian Department. 10. Mr. George Joachim Goschen, First Lord of the Admiralty. 11. Mr. Arthur James Balfour, First Lord of the Treasury and Leader of the Government in the House of Commons. 12. Lord Ashbourne, Lord Chancellor of Ireland. 13. Earl Cadogan, Lord Lieutenant of Ireland. 14. Mr. Charles Thompson Ritchie, President of the Board of Trade. 15. Mr. Walter Hume Long, President of the Board of Agriculture. 16. Lord James, Q. C., Chancellor of the Duchy of Lancaster. 17. Mr. Henry Chaplin, President

of the Local Government Board. 18. Lord Balfour of Burleigh, Secretary for Scotland. 19. Mr. Aretas Akers-Douglas, Work and Public Buildings.

In addition to these there were about thirty-seven other high offices whose occupants were in the Ministry, but were not members of the Cabinet. The line between the Cabinet and the non-Cabinet Ministers is not definitely fixed. There are about ten offices whose holders are always in the Cabinet, and about as many more whose occupants may be in the Cabinet. The chief factor in determining whether a particular office shall be represented in the Cabinet is the will of the Prime Minister and those most intimately associated with him. When the old Cabinet has been defeated, and the Queen sends for the leader of the victorious party, everybody understands that he is to be the new Prime Minister. The Prime Minister consults with the leaders of his party nearest to him in rank, and they parcel out among themselves the chief offices. They decide what members of the party shall be invited to fill the non-Cabinet offices in the Ministry, and what places shall be regarded for the time as of Cabinet rank. That is, among the list of doubtfuls, they determine what officers shall be invited into the Cabinet. In Lord Salisbury's second Ministry, 1886–1892, Mr. Arthur Balfour was Chief Secretary for Ireland, and not in the Cabinet. Later he held the same office, and was a member of the Cabinet; while in Lord Salisbury's third Ministry the office was held by a Minister not of Cabinet rank. In the second Salisbury Ministry the Chief Secretary for Scotland was at first a member of the Cabinet, and later that office was filled by a non-Cabinet Minister.

Sir Michael Hicks-Beach was a member of the Cabinet in 1888, and was without office. This was unusual. Ordinarily only those who hold important offices in the

Ministry are members of the Cabinet. All the Ministers and all the members of the Cabinet are members of one of the Houses of Parliament. Sir Michael was of course a member of the House of Commons. The peculiarity in his case was that he was in the Cabinet without at the same time holding an office. There are in all about sixty executive offices whose occupants must have a seat in Parliament. Here again the line is not sharply drawn. There are offices which may, by law, be represented in Parliament, but which are not thus represented. For instance, there were in the second Salisbury Ministry forty non-Cabinet Ministers. Only those executive officers who are in Parliament are looked upon as belonging to the Ministry. In the efforts to reform the civil service in the United States a good deal of difficulty has been encountered in the effort to draw the line between the political and the non-political offices. In England so far as home offices are concerned this question is determined by the fact of membership in Parliament. Those are the political offices which the Cabinet determine to fill with members of Parliament. As already intimated, the laws do not permit the filling thus of more than about sixty offices. A smaller number is usually chosen.

A change of Ministry involves a change of the political officers only. The great body of the public servants remain in office. This permanent and non-political administrative force exercises an important influence over the political officers. Were it not for the permanent force, it would not be possible for the Ministry to change so frequently without bringing chaos. With the trained officials at hand the new Minister may carry on the business, and at the same time devote a large share of his time and attention to legislative and other political duties.[1]

The executive officers other than the Monarch may be

[1] See Sidgwick, *Elements of Politics*, Chap. XXI.

conveniently divided into four classes. 1. The Prime Minister. 2. The other Cabinet officers. 3. The Ministers not in the Cabinet. 4. The great body of non-political administrative officers.

As early as 1787 Gouverneur Morris in the convention which framed our federal Constitution spoke of the Prime Minister as the real King of England.[1] Mr. Morris's statement may have been a slight exaggeration at the time it was made, but there can be no doubt of the substantial accuracy of the idea expressed as applied to the Constitution of to-day. The Prime Minister may be fitly characterized as an absolute democratic Monarch. Such an expression seems absurd, but, as has been already intimated, a real understanding of the English Constitution involves the acceptance of a good many logical absurdities. An absolute Monarch would call to his aid a few trusted and secret advisers, and these together would proceed to govern the realm. That is, they would control legislative, executive, and judicial business. Now we have seen in former chapters that the Prime Minister and his associates control legislative and executive business. Through the power of legislation and the power of appointments they likewise exercise a general control over the judiciary. It should be observed, however, that the Prime Minister does not *personate* supreme power; he *exercises* supreme power. The Sovereign is the personification of power. The Prime Minister personifies politics. The reality of his power is greater than are the notions of power which men are likely to associate with the office. This power is democratic because, as formerly shown, forces are constantly at work which make it possible at any time for the Democracy of England to replace the one absolute ruler by another just as absolute. The Prime Minister holds his office, not simply in theory but in fact,

[1] *Madison Papers*, p. 361.

by the will of the people. It would seem that the English Constitution has gone as far as possible in the direction of combining an unchecked Democracy with nearly all that is substantial in an absolute Monarchy. After what has already been said it seems scarcely necessary to state that the office of Prime Minister is unknown to English law. According to the forms of law the Monarch holds the place here attributed to the Prime Minister. Both the office and its distinctive duties belong to the understandings and customs of the Constitution. It would require a bold constitution-maker to write down in black and white the work of the Prime Minister. It would doubtless be impossible to reduce the Constitution to written authoritative form without diminishing his power. Moreover, there being no such office in law, of course no one is ever, in form, appointed to the office. It is customary, though not invariably so, for the Minister who is made First Lord of the Treasury to be the Prime Minister. As the holder of the legal office the position of the Prime Minister does not differ from that of other members of the Cabinet. Among his peculiar duties as Prime Minister are the following: 1. He forms the Cabinet and administers discipline to refractory members of the Ministry; for it is understood that the will of the Prime Minister is a large factor in determining the tenure of office in the Ministry. 2. He is the channel of communication between the Cabinet and the Queen. 3. If he is a Commoner, he is Leader of the House of Commons. The highest reach of power and influence is not attained for the office of Prime Minister unless the holder of the office is a member of the House of Commons. In that case he is the Leader of the House, and has thus centred in himself all the dominant forces of the empire. If the Prime Minister is a Lord, then the office is divided, and the leadership of the House goes to another member of the Cabinet.

While the Prime Minister has much of the substance of absolute power, he is not an autocrat; his power is not self-derived nor can it be self-centred. The Prime Minister usually becomes such because he sees more clearly and expresses more perfectly than do other men the dominant forces at work in the mind of the nation. His personal power is greater in proportion as he succeeds in losing himself and bringing his faculties into harmonious action with the forces which exist independently of himself.

The Prime Minister has some duties independent of the other members of the Cabinet, though the other members of the Cabinet, as such, have no duties independent of the Prime Minister. The Cabinet stands together as a unit. Its meetings are secret; no record is made of its proceedings; the only way by which the public is apprised of its action is by noticing what the Government does. Mr. Bagehot gives an account of a meeting of the Cabinet at which the members were divided in their opinions as to what the probable effect of a proposed duty on corn would be upon the price of corn. Half of them thought that it would increase the price, while the others thought it would diminish it. The Prime Minister put his back to the door, and said, "Now is it to lower the price of corn, or isn't it? It is not much matter which we say, but mind, we must all say *the same*."[1] It matters not how greatly the Ministers may differ in their views in their secret meetings, in the Parliament and before the country, so far as possible, they are expected to speak as the voice of one man.[2] If a particular Minister finds that his conscience will not permit him to support a particular measure of the Cabinet, it is his duty to resign his office in order that one may be chosen who

[1] *The English Constitution*, p. 82.

[2] Anson, *Law and Custom of the Constitution*, Part II., pp. 119–120.

can work in harmony with the Government. When Mr. Gladstone's Government began the war in Egypt, in 1882, Mr. Bright resigned his office and left the Cabinet because his peace principles would not permit him to give his support to a war policy. This exemplifies the principle that each member of the Ministry, so long as he consents to remain in office, is bound loyally to support the Government.

The Cabinet formulates the policy of the Government, both legislative and executive. It then becomes the duty of all the Ministers to seek to carry the policy agreed upon into successful operation. On the other hand, the Cabinet and the Ministers in general are under obligation to render support to each Minister in matters peculiar to his office. It is the aim of the Opposition to find out all the weak points in the administration. If the subject under criticism is a matter of executive policy, it is, in nearly all cases, a particular Minister who receives the brunt of the attack, and it is then the duty of all the members of the Government to shield and defend him as best they can. In Lord Salisbury's first Ministry it was Mr. Balfour, the Irish Secretary, who was especially attacked when the policy of the Government in Ireland was made the subject of criticism, yet it was expected that all the Ministers would defend Mr. Balfour so long as he continued to be an approved Cabinet officer. As a general rule, the entire Cabinet stands or falls together. If a particular Minister, especially if a Minister of Cabinet rank, becomes so unpopular that he cannot remain in office, the entire Ministry resigns.

In discussing this subject Mr. Hearn draws a pretty clear line of demarcation between the legislative and the executive duties of the Cabinet, and he maintains that it is the administrative functions rather than the legislative which should in the main determine the life of a Minis-

try.[1] According to his view the Ministers ought not to resign simply because a legislative measure which they have favoured is defeated, unless the measure proposed is in their judgment essential to their administrative policy. This distinction, however, seems to be little recognized in practice. It was the administrative policy of Mr. Gladstone's Government, as shown in the management of affairs in Egypt, which led to its overthrow in 1885. In the same year a member of the Liberal party proposed and carried an amendment to a bill introduced by the Tory Government which favoured the policy of granting allotments of land to agricultural labourers. This was accepted as a vote of censure, and Lord Salisbury's Government resigned. The next year it was the defeat of Mr. Gladstone's measure for the establishment of an Irish Parliament which led to his resignation. Later, Lord Rosebery's Cabinet resigned because of an adverse rôle against an administration officer. In these cases there appears to be no tendency to discriminate between legislative and administrative policy in determining the life of a Ministry. The Ministers stand or fall together on their policy as a whole. The Opposition are naturally inclined to assail the policy at its weakest point, which may be a defect in administration, or a failure in legislation, or it may be such a combination of the two as to elude strict analysis.

The point to be specially noted here is the principle which makes all the Ministers mutually responsible for each other. In matters of administration they are all equally interested in avoiding scandal, because a scandal which arises from the fault of one may result in driving all from office. The non-Cabinet Ministers may have no share in formulating the legislative policy of the Government; yet it is the duty of each Minister to give his sup-

[1] *The Government of England*, p. 241 *et seq.*

port to the measures which the Cabinet brings forth. These non-Cabinet Ministers are chosen by the Prime Minister with the avowed object, among others, of securing their loyal support both in Parliament and before the country. If a Minister cannot be thus loyal, it is his duty to give place to one who can.

The Prime Minister, the other members of the Cabinet, and the non-Cabinet Ministers are all members of the same political party, and are compelled by virtue of their position to take a partisan view of politics. They are the party in power. A sharp line of distinction is drawn when we pass from the Ministry to those who act under their direction in the administration of the laws. These are compelled by virtue of their position to take a non-partisan view of politics, or, at least, they are required to conduct themselves in office as if they were equally loyal to each political party. They are not members of Parliament. They have nothing to do with the business of outlining policies. It is their duty to render their best service in carrying into effect the policy which others adopt. This is, at least, their theoretic position. Mr. Bagehot intimates that the permanent Under-Secretary who stands next to the responsible Minister does, as a matter of fact, exert an important modifying influence over the policy adopted: yet he cannot be a partisan. His great influence arises from the fact that he is not a partisan. He becomes an expert in the art of reconciling impossible partisan pledges which a Minister has made with an actual policy which will not injure the service. To do this work well he must be without partisan bias. He must have equal sympathy with the Radical and the Tory, and render equally loyal service in helping each out of difficulties which have arisen from ill-advised partisan pledges. The Under-Secretary is the connecting link between the partisan Min-

ister and the army of non-partisan officers in the civil service.

The non-ministerial officers in the service are entirely relieved from all party duties. They neither support nor oppose the party in power. They devote themselves entirely to the task of carrying into effect the policy adopted by the responsible Ministers. They may vote at elections as do other citizens, but they may not take an active public part in political meetings.

The Privy Council. — The Cabinet being a body wholly unknown to English law cannot as a Cabinet give advice to the Queen. The laws assume that the Monarch acts upon the advice of individual Ministers, or upon the advice of the Privy Council. So, according to law, the Privy Council is the source of responsible administration. But the members of the Cabinet are always members of the Privy Council. On its executive side the Cabinet is a committee of the Privy Council,[1] whose business it transacts; while on its political or legislative side, the Cabinet is often called a Committee of the House of Commons.[2] Besides the members of the Cabinet of the day, the Privy Council consists of all who have ever been Cabinet officers, with certain other high officials and the dignitaries of the Queen's household, altogether numbering at present two hundred and twenty. As will be shown in another place, the Privy Council still has some judicial business, but it has lost nearly all its functions in the business of administration.

The history of the Cabinet is the history of the encroachment of a secret body unknown to the law upon the legally constituted executive body. To-day if Parliament wishes to commit any administrative business to

[1] Hearn, *The Government of England*, p. 197; Anson, *Law and Custom of the Constitution*, Part II., Chap. III., Sec. III.

[2] Sidgwick, *Elements of Politics*, p. 386.

an executive body, it must create a body for the purpose, or it may commit the matter to the Privy Council or to one of the established departments. Several of the existing administrative departments were in former times connected with the Privy Council. The Board of Trade was for a time a committee of the Privy Council, called a "Committee of Council for Trade." It is now a department of administration, and is represented in the Cabinet. By an act of 1858 the Privy Council was required to supervise local authorities in the execution of certain laws for the preservation of health. Later, in 1871, these functions were transferred to the Local Government Board and were thus taken out of the hands of the Privy Council. The Council is still charged with the duty of executing certain laws for the protection of domestic animals from contagious diseases. For example, it is still possible for the ports of England to be closed against American cattle by "Orders in Council."

By far the most important duties of administration left in the hands of the ancient Council are those which pertain to the execution of the laws for public education. This important business is not, however, committed to the Council as a whole, but to a committee consisting of the Lord President of the Council, a Vice-President with a staff of clerks. The President of the Council is a member of the Cabinet by virtue of his office. The other members of the Committee are usually members of the Ministry by virtue of other administrative offices which they hold. That is, the Committee is made up by appointing to the various offices persons of ministerial rank. It will be seen from this description that the administration of the various educational acts, while in form placed in the hands of a committee of the Privy Council, is in fact under the control of the Cabinet.

The Privy Council is a survival in the English Consti-

tution. No one thinks of it as at present a source of independent power or influence. The Cabinet is the real Privy Council. Whenever business is to be transacted which the forms of law require to receive the sanction of the body of the Queen's responsible advisers, a few members of the Privy Council are summoned to meet the Queen, and the business is transacted. This is called a meeting of the Privy Council, though it may be attended by fewer Ministers than an ordinary Cabinet meeting. It may even consist of a single Minister in attendance upon the Queen.

CHAPTER VII

THE COURTS

IN the American Constitution the courts of law hold an important place. We proceed upon the theory that our Constitution is written; and in our written constitutions, state and national, we have provided courts for the purpose of passing upon the laws enacted by the legislatures and determining their constitutionality. We do not know, therefore, whether a governmental act is valid or not until a court of competent jurisdiction has passed upon it. We depend upon our courts to tell us what our Constitution means. Our real constitutions are thus found not wholly in the written documents bearing the name, but in the decisions of the Supreme Court of the United States and in those of the highest courts in the various states. The study of the American Constitution is in large part, from beginning to end, a study of judicial decisions. One who begins his study of constitutions with that of the United States is surprised at the omission of the courts in the brief descriptions of the English Constitution. If it were not for this peculiarity whereby the courts are empowered to make void a legislative act, the courts would not be made so prominent in the study of the American Constitution.

In order to get a clear view of the constitutional position of the English courts, it is well to inquire what would be the relation of our courts to the working of our Constitution if they were stripped of the peculiar

power of balking the legislatures. They would still be prominent agents in the administration of the law, and as such would have an important modifying influence upon the working of the constitutions. The lower administrative officers in the English civil service exert an important modifying influence upon the working of the Constitution of England, but it is not easy to explain in detail just what that influence is. In like manner the spoils system as it formerly existed in our civil service has been recognized as a noteworthy factor in the working of our Constitution; yet in a brief treatise upon our Constitution little attention is given to these lower administrative officers. Clearness of ideas seems to require that the details of administration should be separated from a comprehensive view of the Constitution.

The Constitution has to do chiefly with the balancing of the dominant forces of government. In the general government of the United States the power of administration is centred in the President, who is made by the Constitution the responsible head of the Executive. It is easy enough to say in general terms that the form of organization of the various administrative departments does effectually modify the action of the President. Yet if one should undertake to state in detail just how a particular subordinate officer or a particular policy determines the action of the President, he would probably state things that are not true, or at least things that would not be believed. Hence it has come to pass that writers on both the English and the American Constitutions have either omitted from the discussion detailed treatment of the departments of administration, or they have not attempted to trace their connection with the working of the Constitution. To discuss the details of administration in a description of the Constitution as ordinarily defined is to introduce matter which appears foreign to the sub-

ject. In a detailed consideration of the methods of administration, the question of primary interest is seldom a constitutional one. This analysis is given for the purpose of making the American student understand how it is that, but for the fact that American courts can make void legislative acts, their constitutional importance would in large part drop out of sight.

In all the lines of action in which the courts are now in conflict with the legislatures, they would in the case supposed become agents for carrying into effect the acts of the legislature. From the standpoint of the Constitution the courts would be analogous to subordinate agents in the Executive. All would concede that the courts thus viewed were important constitutional agents, but a few vague generalities would exhaust the subject. It would, however, be a great error to suppose that this analogy between the courts and the subordinate administrative offices exhausts the case of the relation of the courts to the Constitution either in England or in America.

Judicial business should be sharply distinguished from ordinary administration, even in those lines of action in which the resemblance is strongest. The administrative officer applies the law to the business in hand, and incidentally he is required to interpret the law. Yet it is not his *business* to interpret law; it is his business to do the things which the law enjoins. Courts are provided for the express purpose of interpreting law. If a citizen objects to the application of the law as interpreted by the administrative officer, he may bring an action in the courts to protect himself from such wrong interpretation. The highest court, having jurisdiction in a given case arising under the law, is, therefore, the final interpreter of the law. In this way the courts, even though they have not under the Constitution any power to traverse the action of the legislature, may give to a law a different

meaning from the one originally intended. Judges who should deliberately use this power to overrule the legislature would be subject to censure, and presumably they might be impeached for it. Yet no fact is better attested than that courts of law, through the process of interpreting and applying the laws, are constantly, although usually unconsciously, modifying laws; and that in course of time they may change their meaning. It may be said that administrative officers, by the process of applying a law to the changing circumstances which arise, likewise modify it and give new meaning to its provisions. But there is this difference: an administrative interpretation may be taken to a court and changed, and if an administrative officer does not follow the direction of the court in the matter he may be arraigned and punished. Yet judicial officers may not be punished for a given mode of applying the law, except by the almost unused process of impeachment.

Theoretically, a legislature which is under no constitutional limitations may always change the law if an unacceptable interpretation be given its acts; yet it is not practically possible for the legislature to provide explicitly for the infinite details of administration. From the nature of the case a wide field must be left for discretionary action. In this field the courts rather than the officers of administration are the final determiners of the specific meaning or intention of the law-makers. If the administrative officers refuse to carry into effect the law as interpreted by the courts, these, under certain conditions, issue orders to the officers and compel them to administer it. If the administrative officer attempts to apply the law in a manner contrary to judicial interpretation, the courts may be used to protect the subject from his action. From this it appears that the courts, without the American peculiarity, serve as a check or modifying

influence upon the legislature and upon the administrative officers, and that they are, therefore, more important constitutional factors than are the lower administrative officers.

But there is a large department of judicial action in England, in which the courts do not profess to be controlled by the action of the legislature. They apply rules and principles which are believed to have had no distinctively legislative origin, but which have arisen from custom and judicial action. Modern legislatures, English and American, simply assume the existence of a common law and leave to the courts the task of determining what it is, and of applying it to ever-changing conditions. It is true that by specific act the legislature may change or supplant the common law; yet here again habit and necessity are a stubborn barrier against change. It is still true, notwithstanding many statutory modifications and reforms, that the courts both in England and America are in possession of large and important powers derived simply from ancient custom and from the necessities of government. As these powers have never been clearly defined, and have seldom been made a subject of constitutional debate, little can be done except to recognize their existence and to classify them as ill-defined influences affecting the Constitution.

While one of the most striking differences between the English Constitution and the American is found in that judicial function whereby an American court may make void a legislative act, the most striking similarities of the two constitutions are found in the organization of the courts in the two countries and in their ordinary judicial functions. In all our constitutions, state and federal, are found clauses affirming in general terms certain inviolable rights of the citizen. In America the courts are accustomed to protect the citizen in the enjoyment of the rights thus enumerated, by restraining both the Legislature and

the Executive. The Bills of Rights in American constitutions contain enumerations of all the clearly definable personal rights named in Magna Charta, the Petition of Right, the Habeas Corpus Act, and the English Bill of Rights, and many others not found in any of those documents.

The courts of England perform the same function of protecting the citizen against violations of the provisions of these laws on the part of the Executive, but they are powerless to protect the citizen against violations of Magna Charta or any English law by the Legislature. Parliament might at any time amend or abolish Magna Charta, and the courts could not protect the citizen from the parliamentary act. The personal rights which the citizens of England and America enjoy are almost identical. The citizen of either country is accustomed to look to his Constitution as the source and the guaranty of his rights, but in America a much larger proportion of these rights is explicitly enumerated in the constitutions and the laws. Some of the state constitutions provide that the enumeration of certain rights in the Constitution shall not be so construed as to impair other rights, not there named, which the people enjoy. Yet nearly all rights which are liable to be drawn into controversy are enumerated in the Constitution and the laws. In England this is not the case. Many of the most commonly controverted rights enumerated in all American constitutions, state and federal, are not mentioned in Magna Charta, or in any of the statutes of England. A good illustration of this may be found in the right of freedom of speech. No law or constitutional provision secures to the Englishman any such right; yet the Englishman is as secure in its possession as is the American. The English courts protect the citizen in the right to speak and publish because there is no law against it.[1]

[1] Dicey, *The Law of the Constitution*, p. 251.

There are two fundamental principles in the English Constitution out of which has come a large measure of personal freedom. These are, first, the principle of equality before the law; and second, that the presumptions of law should be in favour of the liberty of the subject. These principles are derived from no written document, but they have a judicial origin. From them are derived the right of free discussion, the right of public meeting, and a multitude of rights and privileges enumerated in our state constitutions. It will be seen from this that the English courts have an even more conspicuous share in making that part of the Constitution which secures to the citizen his personal rights than have the American courts. Our American courts make constitutional provisions under the guise of efforts to give meaning to a written document. The English courts make important constitutional provisions by the application of principles which the court itself is the first to enunciate. In America the courts protect the citizen against the action of legislatures. In England it is the Executive alone which the courts restrain. From the courts of England has come the doctrine that all officers are subject to the law, that the Monarch himself has no power to do violence to the law of the land; that a citizen who suffers injury at the hands of an officer may recover damages in an ordinary court.

The famous documents which are regarded as part of the Constitution of England had their origin in conflicts with tyrannical kings, and mark important stages in the progress of liberty. But the citizen of England searches those documents in vain for a complete statement of the many rights which he knows himself to enjoy under the English Constitution. By far the larger part of these are specified in judicial acts restraining the hand of the Executive. It is possible, also, to find in the action of

English courts a foreshadowing of that transcendent judicial function of making void a legislative act which has been embodied in the American constitutions. While English courts have always bowed to the will of the high court of Parliament, it has ever been their custom to nullify the acts of inferior legislative bodies when they deemed those acts to be inconsistent with the statutes of Parliament or not in harmony with the law of the land. English courts have not hesitated to nullify acts of town councils, and this power to revise or set aside by-laws extends to those passed by colonial legislatures. When the Thirteen Colonies of America, having declared themselves independent of the English government, adopted constitutions which gave to courts of their own the power to nullify acts of the legislature, they but transferred to these courts a power which had been exercised over the colonial legislatures by English courts. When, a few years later, delegates from the states framed a Constitution for the federal government, they extended this function to the Supreme Court of the United States.

The judicial business in England is in the hands of the several following judicial bodies. In the first place, the House of Lords is the court of final appeal for cases arising in the United Kingdom. According to law all the Lords have a right to participate in the judicial business of the House; but it has now come to be one of the well-settled understandings of the Constitution that the judicial business is, in fact, confined to a few members. These are: first, the Lord High Chancellor; second, Lords of Appeal in Ordinary; third, such other Lords as are holding, or have held, high judicial offices. The Lords of Appeal are four in number and are appointed for the express purpose of furnishing to the House high judicial ability to perform this highest judicial function. Much of the judicial business is transacted by the Lord High

Chancellor and the four Lords of Appeal. These are regarded as preëminently the Law Lords, and are life members of the House of Lords. They may participate in all the non-judicial as well as the judicial business of that chamber. They differ, however, from other Lords in that the Peerage does not descend to their oldest sons. When a vacancy occurs, an eminent jurist is appointed by the Crown to fill it. It will be observed that the Lord High Chancellor, who is the presiding officer of the House of Lords and the chief of the Law Lords, is at the same time a member of the Cabinet. It is as if the Chief Justice of the United States presided over the Senate and was at the same time a member of the President's Cabinet. The English Cabinet is an intensely partisan body. The court of last appeal is, according to wisest tradition, furthest removed from partisan politics. Yet the Lord Chancellor is a member of both.

We are accustomed to think of the House of Lords as a branch of the legislature; yet, as explained in the previous paragraph, the House, acting through a few of its members, is the highest court of appeal for the United Kingdom of Great Britain and Ireland. The Privy Council we are accustomed to regard as an executive body, but the Privy Council is also a court of last appeal for cases arising outside of the United Kingdom, in India and in the Colonies. The Privy Council also, in conjunction with certain ecclesiastical officers, hears appeals from ecclesiastical courts. The judicial business of the Council is performed through a committee, known as the Judicial Committee of the Privy Council. This Committee is composed of the Lord President, the Lord Chancellor, the Lords of Appeal, and other high officials who are members of the Privy Council. It will be observed that the Committee is composed in large part of the men who are Law Lords. The Lord Chancellor and the Lords of Appeal

are thus active members in each court. The Lord President of the Council is a Cabinet officer, and is also usually a Peer. Though a member of the Judicial Committee, he is not in all cases a lawyer. The House of Lords and the Privy Council are thus both courts of final appeal, the division of business between them being in the main geographical. The Privy Council is of especial interest to Americans, because it is with this part of the government that the Colonies had most to do; and it was the action of the Council in nullifying acts of colonial legislatures which furnished a sort of precedent for conferring this high function upon American courts.

When the House of Lords acts as a court, the form of procedure is the same as in case of legislative business. Speeches are made for and against the measure. A vote is taken, and a decision is reached in accordance with the vote of the majority. The Law Lords are not distinguished, as a body, from other Lords by any formal act. That is, they are not in form a committee of the House. It is by mere understanding that the Law Lords are relieved from the interference of other members, and that, while thus acting alone, they represent the entire House. The Law Lords are accustomed to hold sessions while Parliament is not in session.

The judicial officers in the Privy Council are in form, as well as in fact, a committee of the Council. The Council being an executive body in its form of organization, the action of the Judicial Committee assumes the form of an executive act. The Committee deliberates in secret, and their decision takes the form of a statement of reasons why the Committee advises the Queen to affirm or reverse the decision in question. Only the opinion of the majority is given in case of a decision by the Committee. In case of a decision by the Lords, the opinion of all who take part in the discussion which precedes the vote is made a matter of record.

Next to the House of Lords and the Judicial Committee of the Privy Council stands the Supreme Court of Judicature. Yet under this title the Court performs no judicial acts, its judicial business being transacted through its two divisions, the Court of Appeal and the High Court of Justice. The Supreme Court as a whole may, however, draw up rules for the guidance of these divisions. The High Court of Justice has three divisions, viz.: 1. The Chancery Division. 2. The Queen's Bench. 3. The Probate, Divorce, and Admiralty Division. There are thus in what is called the Supreme Court, four separate courts. The Court of Appeal is composed of nine judges, three of whom are presidents of the three divisions of the High Court of Justice. From each of the three divisions of the High Court, appeal may be taken to the Court of Appeal, and from the Court of Appeal to the House of Lords. The Chancery Division is composed of five justices besides the Lord High Chancellor, who presides. In the Queen's Bench Division are fifteen justices, one of whom is the Lord Chief Justice. In the Probate Division are two justices. If we add these to the nine judges of the Court of Appeal, we get the number thirty-two, yet there are in the Supreme Court only twenty-nine. The discrepancy arises from the fact that in a few instances the same individuals are members of more than one division. The Lord High Chancellor is not only a Law Lord and a member of the Judicial Committee of the Privy Council, but he is also a member *ex officio* of the Court of Appeal, and is President of the Chancery Division of the High Court of Justice. Likewise the Lord Chief Justice, in addition to his membership in the two courts of final appeal, is a member *ex officio* of the Court of Appeal, and a member of the Queen's Bench Division of the High Court. The justices of the High Court hold sittings in various parts of England.

That branch of the Supreme Court which bears the name Court of Appeal holds its sittings only in London. It is composed of the Master of the Rolls and five Lords Justices, and it usually sits in two divisions, three Lords Justices sitting together, though for certain purposes two are sufficient. In this way its capacity for transacting business is doubled. Each branch is treated as the full Court of Appeal, and the appeal from its decisions is to the House of Lords. The other branch of the Supreme Court, which bears the name High Court of Justice, also through its three divisions, the Court of Chancery, the King's Bench, and the Probate Court, holds sittings in London; and it also, through its justices, holds sittings in the various shires and assize towns in England, with two or more justices sitting together, or, in an assize town, with only one justice. Each of these is a session of the High Court of Justice, and an appeal from its decisions goes to the Court of Appeal. It is by this subdivision into many coördinate parts that the High Court of Justice is enabled greatly to increase its capacity for transacting business.

The various divisions of the High Court of Justice have original jurisdiction in all sorts of cases at law, but the number of judges is not adequate for the trial of all cases. A large part of the judicial business is therefore performed by County Courts established in 1846. England and Wales are divided into about five hundred districts, and these districts are grouped into fifty circuits. A county judge is appointed for each circuit, who holds a court in each of the districts of his circuit. In the making of these districts and circuits, no attention is paid to county lines. Ordinary civil cases involving £50 or less may be tried in this court. Certain other cases, as an action for the partition of an estate or for the winding up of a partnership, may be tried in this court even

though the amount involved is £500.[1] If a case which may by law be tried in this court be taken by the plaintiff to the High Court, the judge may order it back to the county court, or he may refuse to allow the plaintiff a larger sum for the costs of the suit than would have been allowed in the county court. For these reasons the county courts do nearly all the business permitted by law.

The court whose jurisdiction corresponds to the county area is the old court of Quarter Sessions. This court has four regular meetings annually. It is usually attended by a number of the justices of the peace, and it requires two or more of the justices sitting together to constitute a court. It has jurisdiction over a great variety of crimes. The laws specify a few of the higher crimes which this court may not try, but it may try all others. By various special acts, two or more of the justices are empowered to hold courts of equal grade with the court of Quarter Sessions. There are also many petty offences which may be tried in a summary way by one justice of the peace. This is called a court of Petty Sessions.

Until 1888, when the County Councils were created, the justices of the peace in the court of Quarter Sessions attended to a great variety of county business of administrative and legislative character. It still has power to license the sale of liquor.

The courts, for the most part, are free from partisan strife. Their position is clearly defined, and the question of encroachment upon other governmental powers is seldom raised. It will be seen, however, when we trace the development of the Constitution, that this was not always the case, that in the earlier time the courts were eminently political, that they were an important factor in determining the relations of the Crown, the Church, the Parliament, and other governmental agencies to each other.

It will be seen that in still earlier times there existed no separate judiciary in the modern sense, judicial business being not distinguished from other governmental business. There are, indeed, certain features of the present organization which are explained by reference to the ancient union of all governmental functions in one assembly. It is thus that we account for the existence of the judicial business in the House of Lords and the Privy Council. Both of those bodies are derived from the ancient assembly, the Wetan, and later the *Commune Concilium*, in which subsisted all governmental functions.

CHAPTER VIII

THE CHURCH

IN a history of the Constitution of England the Church holds a prominent place; but in the description of the Constitution as it exists to-day it may be passed over almost without notice. Twenty-six bishops of the Established Church are members of the House of Lords, and this fact has something to do with that balancing of political forces which conditions the working of the Constitution. But it is not easy to say just what difference the presence of the bishops makes. They are nearly all Conservatives in politics, as are the other members of that House. If a bill were introduced to exclude the bishops from the House of Lords, the plea would undoubtedly be urged by those who opposed it that such an act is unconstitutional, that by ancient custom the bishops have a right to the privilege. This is certainly true. Yet if such an act were to be passed in the regular constitutional way, by a majority in the House of Commons, supported by a majority of the voters of the nation, in whom the sovereign power of the British government is now held to reside, the Constitution would be thereby changed, or, as Americans would say, amended, and the ancient, constitutional right of the bishops to sit in the House of Lords would become unconstitutional and void.

England is divided into ecclesiastical parishes;[1] and, according to the ancient legal theory of the Constitution, all baptized persons who live in a parish or extra-parochial liberty are members of the Church. As one consequence of this theory the qualified voters of the parish have still a share in the election of Church wardens, part of whose duties are ecclesiastical. The time was when all the people were subject to the rule of the one Church; when Church officers and Church courts attended to a large share of the business now transacted by the civil authorities. As late as 1857 the Archbishop's Court had jurisdiction in questions of marriage and divorce. By act of Parliament this business was afterwards transferred to the civil courts. The Established Church still maintains its ancient forms for legislation, and still has a system of Church Courts; but these governmental agencies are now chiefly exercised on behalf, not of the entire population, but simply of those who profess membership in the state Church. Practically they deal only with the clergy. A dissenting church in England adopts its own form of church government and discipline, and if it does not infringe upon any civil right, it may do anything it pleases with its own members. The Established Church cannot do this. The legislative bodies of the Established Church must secure for their acts the ratification of Parliament before they can be made effective in matters of discipline. Parliament has, however, by special acts, given to the Established Church almost the same powers of discipline which dissenting churches enjoy. These disciplinary powers are enforced by legally established Church courts with an appeal from the Archbishop's Court to the Queen in Council; that is, the judicial committee of the Privy Council. These courts being legal, disregard of their orders may be punished by imprison-

[1] There are certain districts outside of any parish, called extra-parochial liberties, such as Westminster Abbey and Lincoln's Inn.

ment. While a court in a dissenting church cannot punish for contempt, the same practical result may yet be secured by taking the case into an ordinary court, and if the church is found to be within the law, the court will enforce its act of discipline on the ground of a contract between its members to abide by the rules duly authorized.

This ancient organization, which at times has been a dominant factor in the English government, is thus seen to be in many respects scarcely distinguishable from other religious bodies having no connection with the government. The Established Church could be disestablished without the knowledge of the ordinary citizen, if it were not for the existence of Church property. The dissenting bodies, on the one side, claim that a large part of the property now in the hands of the Established Church belongs of right to the nation at large. The members of the state Church, on the other side, claim a right to all the property now used for its support. This is, in the main, a legal and a political question based upon a variety of facts in past history, and such a question cannot fail to disturb the practical working of the Constitution. One political party tends to support the policy of disestablishment, the other favours the view of the Established Church. The Church thus becomes a considerable factor in politics.

In America, if the government should propose to take property from a church or an individual, there would instantly be raised the constitutional objection that private property cannot be taken for other than a public use, and that it cannot be taken for a public use without just compensation. In America. then, if ownership were legally established, the Constitution would secure to the Church all its property, or, at least, just compensation for any property taken. Now there is undoubtedly in England a widespread feeling, or understanding, that the

right of property is sacred and inviolable. There are those who even regard this feeling, or understanding, as a part of the English Constitution; but this feeling, or understanding, cannot prevent Parliament from taking from the Church the property which it claims as its own, if Parliament and the nation should so will.

CHAPTER IX

SOURCES OF THE CONSTITUTION

TO sum up the foregoing chapters: The English Constitution is a body of rules and understandings more or less clearly defined, in accordance with which the various governmental agencies are kept in harmonious action. The greater part of these are not laws at all, but are mere understandings based upon custom, or growing out of the necessities of government. Yet, if we apply the American analogy to the English Constitution, we find that a part of it is actual law. In the chapter on the courts the fact has been pointed out that some of the most important rules of the Constitution have had a judicial origin. The rule that the Monarch can do no wrong, or that the King cannot be accused in a court of law, is a rule of the courts. Likewise, the rule that the official acts of the King must be done through a Minister who is legally responsible for them, was made by the courts. So also was the rule that all officers, military and civil, may be punished in the ordinary courts for violating the law. In this way the Executive is constantly checked by the courts of law. In America, for example, we secure the right of petition, the right to freedom of speech, the right of public meetings, the right to bear arms, the right of trial by jury, by clauses which we have inserted in our state and United States constitutions. In England these rights are secured mainly by the rulings of courts.

It will be observed that these rules are not mere understandings; they are laws, and laws enforced by the courts. That is, they are a part of the common law. Again, a part of what we should call constitutional law is, in England, enacted by Parliament. Certainly, a statute which declares the throne vacant and then proceeds to provide for the filling of it in a certain way would, according to American analogy, be a part of the Constitution. We enjoy the benefits of the writ of *habeas corpus* by virtue of provisions in our constitutions. In England the same right is secured by a statute. Besides Magna Charta, the Petition of Right, the Habeas Corpus Act, and the Bill of Rights, there are many other acts of the English Parliament which, with us, hold a place in our written constitutions.

This analysis gives us three distinct sources of constitutional rules. There are, first, understandings which are not recognized as laws; second, rules of common law made by the courts and enforced by them; and third, acts of Parliament. It is nevertheless true that no part of the English Constitution has been constructed by a deliberate act of constitution-making in the American sense. Neither the courts nor Parliament ever sat down to construct a fundamental law which has for its object the distribution of powers and the securing of their harmonious exercise. It is doubtful whether the English themselves would ever have thought of calling these rulings of courts, and these statutes, a part of their Constitution, except for the American analogy. I am unable to find a word in Blackstone to suggest the notion that there was such a thing as constitutional law. To his mind the contents of the Constitution were the understandings by which the high powers of state were balanced and kept in harmony. But for the American analogy, the Constitution would probably have remained distinct from the law and en-

tirely made up of the unwritten and the extra-legal parts. According to this definition, there would be a sort of perpetual warfare between the Constitution and the law. One or another of these understandings of the Constitution would tend to encroach upon some law. As a result of this a contest would arise. In course of time, the contest would be settled by a new law or a more perfect understanding. If by a new law, then that which was Constitution before would cease to be regarded as a part of the Constitution and would become a law. In the nature of the case, therefore, the understandings of the Constitution are preëminently the contentious part of the government.

The chief object of a constitution is to prevent the encroachment of the several departments upon each other and to secure harmonious action. If there is no tendency in one governmental agency to encroach upon another, if there is no contention, then what use for the word? In these constitutional contentions the claim is always made that some proposed action is in violation of the Constitution. It is assumed in opposition to the measure that the Constitution is inviolable and unchangeable. If, however, in the face of such a contention the measure is adopted and a new policy is inaugurated, a change is thus effected in the Constitution.

Previous to 1832 the House of Lords claimed to be an equal and coördinate branch of the legislature. The Lords first met the proposition to force them to pass the Reform Bill with the plea that such an act would be a flagrant violation of the Constitution. The Duke of Wellington, himself, who, a few years later, took a leading part in persuading the Lords to accept an inferior place in the government, was at first strong in the expression of his conviction that the proposition to deprive them of equal and coördinate power was a violation of the Con-

stitution. But the Lords were forced to pass the bill by the threat of the Executive to create new Lords and thus insure its passage. This act gave rise to a new and important understanding which it took a good many years thoroughly to settle; and so long as it was unsettled it was an object of frequent contention. It has now become an unchangeable and inviolable part of the Constitution, and it would long ago have ceased to be thought of as having any special constitutional importance if it had not recently been made the basis of new contentions. Since the Lords must yield to the Commons, the question arises, When must they yield? How shall they know when to yield? If they accept a bill in the main, may they not introduce some changes? These are questions about which there is still contention; and so long as such contentions exist, that part of the Constitution which requires the Lords to yield to the Commons will continue to be of special interest.

That part of the English law, either common law or statute, which is for the time being in conflict with one of the understandings upon which the stability of the government depends, is of constitutional importance because of the conflict. The perfection of the Constitution will have been reached when all such contention shall cease. When the rights, privileges, and immunities of all classes of the people shall have been determined; when the exact position of the House of Lords and that of the Crown shall have been defined, and the ultimate form of the legislature shall have been determined; when the courts shall know their place, and all disputes be settled as to the relations of legislative and executive agencies,—when these and all other similar questions shall be settled, then the term "Constitution" will have a new meaning in England, or at least an ancient meaning of the word will cease to exist.

We read that the Constitution of England has remained

without essential change for more than a thousand years. The Danes came, but they ruled according to the English Constitution. Even the Normans did not displace the English Constitution. The revolution of 1688 was simply a device for perpetuating the ancient English Constitution. It is not possible to give a precise meaning to the term as used in such expressions, but a sufficient reason for the phraseology may be found in the fact that there has not been a time when the form of the government was not in large part determined by previous history. At every point there has been a conscious reference to the past.

At all times large classes of citizens have been recognized as being in possession of privileges which could not be taken from them. If a particular privilege was removed for a time, the memory of it remained, and in course of time the privilege was often recovered. It is only in comparatively recent times that the term "Constitution" has been used to express the means whereby ancient rights have been preserved and transmitted. It will be observed that it is this use of the term which has given rise to the idea that the Constitution is unchangeable, sacred, and inviolable. Whether the Constitution is really unchanging is a mere matter of definition. If we give a definition which is sufficiently indefinite, we can say with much confidence, "The Constitution of England under Queen Victoria is, indeed, the very Constitution under which the Confessor ruled and which the Conqueror swore to obey."[1] All that is true in such a statement, however, may be found in the words: There are important characteristics of the English government which have continued without change from the Confessor to Victoria.

Whatever definition may be given to the English Constitution, all will agree that it is an outgrowth of English

[1] Hearn, *The Government of England*, p. 4.

history, and in a sense in which the American Constitution is not an outgrowth of history. If our forefathers, when they assumed independence, had not adopted any written constitutions for the government of their states, but had succeeded in governing themselves by self-control, by habits, by customs, and by mutual understandings; and if, when they felt the need of a general government, they had formed one in the same way, we can see that such a government would have been dependent upon its ordinary history for harmony of action in a way in which governments by written constitutions are not dependent. In that case the agencies by which encroachments are prevented and by which harmony of action is secured would be derived from our history. There would have been governors, not because state constitutions provided for their existence, but because experience and the necessities of the case led to their use. There would have arisen a President or a corresponding officer, in the same way. It is quite natural for an American to say that such a supposition is absurd and that the thing is impossible. Yet this is exactly what the English have always been doing.

The Americans, at a certain time, in a certain way, addressed themselves to the task of making constitutions. First, each of the thirteen states framed or adopted a written document which they called a State Constitution, some of them accepting as such the royal charters which had previously been in force. A little later, the people, by means of a constitutional convention, framed a Constitution for the general government. These documents are a part of our written laws. To the courts are given the power and the duty of interpreting and applying these laws which we call Constitutions. Our real Constitution which is in force to-day is made up of what the courts and other officers have held to be the meaning of the

written documents. An instructed American would not say that the Constitution which Washington swore to support is the very Constitution which Mr. Cleveland is now endeavouring to maintain. He knows that important changes have been made by the formal act of amending; and a well-informed American knows that much more important changes have been effected by official acts of interpretation and application. The American Constitution grows by amendments; but it grows much more by official, and especially by judicial, interpretations. A history of the American Constitution is a history of the legislative, executive, and judicial interpretations of the written documents. Our constitutional literature takes the form of a commentary on, or an exposition of, the written documents. Literature on the English Constitution takes the form of a description of the leading governmental agencies and their relations to each other, and an historical account of the manner in which the government came to be what it is. The American Constitution is that which has been read out of, or read into, certain written documents. The English Constitution is that which has been read out of, or read into, certain events in English history. In the place of an exposition of certain documents there is a peculiar reading of certain parts of English history.

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